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## Federal Maritime Commission v. South Carolina State Ports Authority: Small Iceberg or Just the Tip?

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***FEDERAL MARITIME COMMISSION v. SOUTH CAROLINA STATE  
PORTS AUTHORITY: SMALL ICEBERG OR JUST THE TIP?***

PROFESSOR GORDON G. YOUNG\*

Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose. *In saying this, I do not simply reiterate the dissenting views set forth in many of the Court's recent sovereign immunity decisions. For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court's conclusion here.*<sup>1</sup>

Reaction to the [*Maritime*] decision across the ideological spectrum was less than enthusiastic, to put it mildly. Said one conservative scholar, “I’m beginning to be embarrassed.”

...

[However,] Conservative Bruce Fein said the decision is largely symbolic. Mr. Bruce Fein . . . : “It seems to be, you know, a lot of bombast about very little.”<sup>2</sup>

INTRODUCTION

Along with the text of the Constitution, the Supreme Court’s federalism and separation of powers cases define the overall structure of government in the United States. These cases run together in *Federal Maritime Commission v. South Carolina State Ports Authority* (hereinafter “*Maritime*”),<sup>3</sup> decided by the Supreme Court near the end of last term. Intersecting in *Maritime* are cases dealing with state immunity from private suits under federal law<sup>4</sup> and those

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\* Professor, University of Maryland School of Law. I appreciate the comments of Jeremiah Collins and Bob Percival, who were co-panelists with me at a Faculty Workshop on the *Maritime* case held at the School of Law, and the comments of my colleagues who participated in the ensuing discussion. Special thanks are due Ruth Fleischer and Richard Boldt for help and encouragement and the Dean of the School of Law for a summer grant that funded, among other research, work on this article.

1. Fed. Mar. Comm’n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1881 (2002) (Breyer, J., dissenting) (citations omitted) (emphasis added).

2. *All Things Considered* (National Public Radio broadcast, May 28, 2002) (Nina Totenberg reporting and quoting a number of legal scholars) [hereinafter NPR].

3. 122 S. Ct. 1864 (2002).

4. See *infra* notes 24-70 and accompanying text.

dealing with transfers of federal judicial power from the regular Article III courts to the executive branch agencies, or the so-called legislative courts.<sup>5</sup> In ways bearing on the issues in *Maritime*, the cases dealing with adjudication outside of Article III courts are also connected with the hazy line that is drawn in constitutional case law between the public and private spheres.

Justice Thomas' opinion for the majority of justices in *Maritime*, including Justices Rehnquist, O'Connor, Scalia, and Kennedy, held "that state sovereign immunity bars [federal administrative agencies] from adjudicating complaints filed by . . . private part[ies] against . . . nonconsenting State[s]."<sup>6</sup> In so holding, those five justices, a perennial states' rights bare majority, continue a line of cases that they inaugurated in 1995, which greatly strengthened the states' immunity from suits under federal law.<sup>7</sup> Viewed more broadly, they

5. See *infra* notes 71-119 and accompanying text.

6. *Maritime*, 122 S. Ct. at 1874. The unedited quotation initially focuses on the Constitutionality of the precise adjudication in *Maritime*, but then turns to consider not just this instance but "such an adjudication." Unedited and in full, it reads:

This case presents the question whether state sovereign immunity precludes petitioner Federal Maritime Commission (FMC or Commission) from adjudicating a private party's complaint that a state-run port has violated the Shipping Act of 1984, 46 U.S.C. App. § 1701 *et seq.* (1994 ed. and Supp. V). We hold that state sovereign immunity bars such an adjudicative proceeding.

*Id.* at 1867-68. Other portions of the opinion (1) make it clear that state immunity applies at least to all private party initiated and controlled agency litigation (a) seeking damages from states regardless of whether the state or an officer is named a party and (b) seeking any remedy if the state is named a party, and (2) arguably suggest that, unlike suits in courts, those in agencies are barred by immunity even if brought against state officers simply to compel future compliance with federal law. *Id.* at 1874-79. Beyond this, I sense the possibility that *Maritime* may be a step toward a reappraisal of such officer suits when brought in court and much more remotely to a reappraisal of the largely dormant anti-delegation doctrine as applied to agencies' powers to regulate states. The latter two concerns may be my imagination fueled (1) by the recent progression of state immunity cases, (2) by what I see as significant silences in the *Maritime* majority opinion, and (3) by my sense that, if reappraisal of the relationship of the new administrative state to federalism begins with state immunity, states rights partisans will be drawn to a reconsideration of related separation of powers issues as well. By this I mean that, for reasons of state dignity so prominently stressed in *Maritime*, the Court conceivably could tighten the requirements of the anti-delegation doctrine as applied to regulation of states. This would force Congress itself, rather than agencies, to do more of the policy making in such cases. Such a development would make regulation of states more difficult and would be an oblique method of limiting *Garcia v. San Antonio Transit Authority*, 469 U.S. 528, 555-57 (1985). *Garcia* permits, over the objections of several of the current states' rights justices, Congress to regulate the states under the Commerce Clause and other original powers.

7. The first and most important of these cases is *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 59-73, 73-77 (1996), which overruled an earlier case that allowed Congress to abrogate state immunity when imposing duties on states in legislation supported only by the Interstate Commerce Cause and clarified the Court's view that state immunity is based on an implicit original constitutional understanding. In addition, the Court found the normal injunctive remedy against state officers who act unconstitutionally preempted by a special remedy created

extended a larger group of cases strengthening states' rights in general, which those Justices originated in 1992 and of which the immunity cases are one subset.<sup>8</sup> All of these federalism cases have been strongly polarized and have included powerful dissents, most often by Justices Stevens, Souter, Breyer and Ginsburg, making the margin in most cases 5-4.<sup>9</sup>

On two occasions, dissenters have taken the unusual step of reading their opinions from the bench.<sup>10</sup> *Maritime* is the second of these, demonstrating the strength of the reaction that the majority opinion provoked. Justice Breyer's dissent contains the following passage:

Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose. *In saying this, I do not simply reiterate the dissenting views set forth in many of the Court's recent sovereign immunity*

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by Congress under the Indian Gaming Act, despite the Court having ruled that remedy unconstitutional and thus leaving the plaintiffs without direct recourse in enforcing their rights. *See* Gordon G. Young, *Seminole Tribe v. Florida*, 56 MD. L. REV. 1411, 1428-33 (1997) (examining the possible implications of the *Seminole Tribe* holding on the development of state immunity jurisprudence) (cited in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 554 (3d ed. 2000), for the proposition that a more limited argument under the Tenth Amendment might well have been preferable to opening the door to close scrutiny of statutes for the preemption of the usual injunctive remedy). The second of these cases is *Alden v. Maine*, 527 U.S. 706, 754 (1999), which held that state immunity permits states to refuse to provide state judicial fora to hear suits against states under federal law despite a general requirement that state courts entertain suits arising under federal law in cases not involving the state as a defendant.

8. The first case is *New York v. United States*, 505 U.S. 144, 188 (1992), which held that even legislation otherwise valid under the Commerce Clause violates the principles of federalism if it forces states to enact, as state law, legislation dictated by Congress. The second case is *United States v. Lopez*, 514 U.S. 549, 551 (1995), which held for the first time in nearly sixty years that a piece of legislation (the Gun-Free School Zones Act of 1990) is beyond Congress' powers under the Commerce Clause. The third is *Seminole Tribe*. *See supra* note 7. The fourth case is *Printz v. United States*, 521 U.S. 898, 933 (1997), which held that Congress may not compel state law executive officers to enforce the federal law to perform background checks on prospective gun purchasers pursuant to the Brady Handgun Violence Prevention Act). The fifth is *Alden*, 527 U.S. at 754. The sixth case is *United States v. Morrison*, 529 U.S. 598, 617-18 (2000), which held that the Violence Against Women Act is beyond Congress' Commerce Clause powers despite voluminous findings that the violence it regulated substantially affected interstate commerce. The seventh is *Maritime*.

9. Specifically, the vote splits were: *New York v. United States* 6-3, *Lopez* 5-4, *Seminole Tribe* 5-4, *Printz* 5-4, *Alden* 5-4, *Morrison* 5-4, and *Maritime* 5-4.

10. *See* Michael Kirkland, *Court Divides Again on Federalism*, UNITED PRESS INT'L, May 28, 2002; David G. Savage, *High Court Curbs Federal Lawsuits Against the States*, L.A. TIMES, Mar. 28, 1996, at A1 ("In a rare occurrence, Justice David H. Souter read parts of his dissent [*in Seminole Tribe*] from the bench. In written form, it ran to 92 pages.").

*decisions. For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court’s conclusion here.*<sup>11</sup>

Despite these dissenting opinions, I conclude that the holding and clear language of the majority opinion in *Maritime* breaks little, if any, new ground.<sup>12</sup> When *Maritime* is read fairly in the context of the earlier cases dealing with state immunity, it is not, in fact, a large departure from the pre-existing state immunity cases. Instead, it is a natural mapping of those troubling decisions onto the landscape of the post-New Deal administrative state. In *Maritime*, the immunity cases are projected onto that part of modern constitutional law that permits, while it also limits, agency adjudication of matters that were originally within the judicial power granted to the federal courts by the text of the Constitution.<sup>13</sup>

Despite their protestations that *Maritime* is a serious extension of state immunity, a very large part of what disturbs the dissenters must be the pre-existing line of cases. They rightly deplore earlier cases to the extent that they protect states from suits that assert rights created under federal law.<sup>14</sup> But I take them at their word, that *Maritime* is greatly disturbing to them and that their objections range well beyond their dislike for that which went before it. What then is the reason for their concern? I believe that what disturbs the dissenters (and certainly what disturbs me) about *Maritime* is more subtle than its holding or any of its clear statements. The truly unsettling things are suggestions, which may be real or may be apparitions, appearing to readers who are already unsettled by concerns about where recent limitations of federal power will stop. In particular, the *Maritime* majority opinion, to me, provokes two substantial worries.

The first of my concerns is the fate of agency adjudications, and even court suits, against state officers (not against the state itself as in *Maritime*) to stop prospective violations of federal law. Such suits are part of a precarious balance worked out by the Court nearly a century ago in order to allow state immunity to meaningfully coexist with the supremacy of federal law, which the Constitution clearly dictates.<sup>15</sup> Neither the holding in *Maritime* (where the state, not an officer, was sued) nor any of its clear language contains such a threat, and yet a threat appears to me. My speculation is that it appears to the

11. *Maritime*, 122 S. Ct. at 1881 (Breyer, J., dissenting) (citations omitted) (emphasis added).

12. See *infra* note 151-152 and accompanying text.

13. See *infra* notes 71-119 and accompanying text.

14. See generally the dissenting opinions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76-84 (1996), and *Alden*, 527 U.S. 706, 760-814 (1999). See Young, *supra* note 7, at 1429 n.120 (I agree with the many commentators who believe that state immunity should be inapplicable to suits under federal law).

15. U.S. CONST. art. VI, cl. 2 (stating the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land”).

dissenters in the same way. That perception is fueled by the opinion of two Justices in a recent case urging new rigorous limitations on suits against state officers,<sup>16</sup> and also by a slightly earlier opinion embracing other new limits.<sup>17</sup>

My second concern is a broader one. Let us suppose that things turn out well so that, over the next several years, the law that permits private *suits in courts* against state officials does not change. Also suppose that the states' rights majority chooses to apply different, more restrictive rules to federal administrative agencies. If these things come to pass, then what does this mean more broadly? If certain adjudicatory functions of the courts can freely be transferred to agencies, but only when the state is not their target, are there also special rules for the delegation of legislative power to regulate the states? Will the new federalism agenda turn to (or branch out to include) special separation of powers limitations on the federal government in cases where the exertion of federal power affects the states? In theory, this would not bar federal regulation of states under original federal grants of powers such as the Commerce Clause, and, again in theory, it might make federal regulation of states more accountable to the national political process.<sup>18</sup> In practice, it could make much federal regulation of states much more difficult.<sup>19</sup>

*Maritime* cannot be appraised solely from the perspective of the recent state immunity cases or even from that of the broader set of states' rights cases. While the states' rights line of decisions is dominant in *Maritime* (and states' rights fervor the most powerful force shaping the decision), the correct result in

16. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (holding that certain suits against state officers to quiet title to land implicate major state interests are outside of the exception to state immunity recognized for suits seeking prospective relief against state officers and, thus, barred). This limited the doctrine of *Ex parte Young*, 209 U.S. 123, 155-56 (1908), which liberally permitted injunctions against state officers to stop future violations of federal law. Justice Kennedy's opinion (otherwise for the majority), which was joined only by Chief Justice Rehnquist, took the position that the availability of an injunction against a state officer, under the *Ex parte Young* doctrine should depend upon a balancing test including, as one factor, the availability of relief in state courts. *Coeur d'Alene*, 521 U.S. at 270-88. For the disagreement of Justices O'Connor, Scalia, and Thomas on this point, see *Coeur d'Alene*, 521 U.S. at 291-97 (concluding that the suit in *Coeur d'Alene* was barred by a narrow exception to *Ex parte Young* suits, which those justices saw as presumptively within the federal courts' jurisdiction, and not generally barred by principles of federalism, including immunity).

17. See *Seminole Tribe*, 517 U.S. at 74 (finding the normal injunctive remedy against state officers who act unconstitutionally preempted by a special remedy created by Congress under the Indian Gaming Act, despite the Court having ruled that remedy unconstitutional, and, thus, leaving the plaintiffs without direct recourse in enforcing their rights). See also *Young supra* note 7, at 1428-33 (examining the possible implications of the *Seminole Tribe* holding on the development of state immunity jurisprudence).

18. See *infra* note 219 and accompanying text (discussing *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985); *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

19. See *infra* notes 218-24 and accompanying text.

the case is dependent on cases dealing with the separation of powers between the executive and judicial branches.<sup>20</sup>

This group of cases concerns when and to what extent federal adjudication can be conducted in agencies and in courts established outside of the Constitution's judiciary provisions. These cases are much less linear than the virtual straight-line progression of the post-1992 cases protecting states from various legislative and judicial actions taken to serve federal interests and to enforce federal law.<sup>21</sup> Among cases dealing with federal adjudication are those, such as *Crowell v. Benson*<sup>22</sup> that turn on the often razor thin distinction between the public and private spheres.<sup>23</sup> Ultimately, the force of Justice Breyer's dissent in *Maritime* depends on how much support such cases offer for distinguishing—in ways relevant to the Constitutional policies underlying

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20. Article III and its restrictions originally controlled federal adjudication. The restrictions included requirements that federal judges be politically insulated and, according to a current majority of justices, state immunity. That majority finds such immunity to have been an original, implicit limit on the judicial power. When the Court began allowing federal adjudication outside of Article III courts and particularly in agencies, the requirements for politically insulated judges were eliminated or relaxed. The question that emerged was would the state immunity restrictions against suing states follow federal adjudication into these new bodies? To answer this question, one needs to understand both the state immunity line of cases and the line permitting some non-Article III adjudication.

21. Article III vests the judicial power in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Those courts are to be staffed by judges who are somewhat insulated from political pressures by a grant of life tenure, subject to impeachment for "high crimes and misdemeanors" and by a prohibition against having their salaries reduced. *Id.* The judicial power includes, among others, suits arising under federal law, those to which either the United States or a state or both are parties, suits between citizens of different states, and admiralty cases. *Id.* § 2, cl. 1. The cases discussed below all consider when adjudication outside of Article III courts is consistent with Article III, given that the latter might be read to cover all federal adjudications of the sort described as within the judicial power. All but *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), permit such non-Article III adjudication in the circumstances presented to it, and all offer at least clues to the factors bearing on the validity of such adjudication. See *Crowell v. Benson*, 285 U.S. 22 (1932); *Williams v. United States*, 289 U.S. 553 (1933); *N. Pipeline*, 458 U.S. 50; *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). See also Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee through Crowell to Schor*, 35 BUFF. L. REV. 765 (1986).

22. 285 U.S. 22 (1932).

23. This is an amorphous set of cases dealing with the public and private distinction in a variety of contexts. Each is different, but there are commonalities and mutual influences between them. The cases included in note 21 sort out the distinction between public rights cases with respect to which the Court more freely has permitted federal adjudication outside of Article III courts and private rights cases, where it has demanded more safeguards, but still allowed agency and Article I court litigation. See *supra* note 21. Other cases which may well have influenced the Article III public and private cases include substantive due process cases. See Young, *supra* note 21, at 807-38.

state immunity—agency adjudication from private dispute resolution in the courts.

## BACKGROUND

### *State Immunity*

In the last decade, a majority of the Court (usually the same five justices)<sup>24</sup> has engaged in constitutional interpretation that intensifies states' protection from the effects of federal legislation aimed at regulating them. Some of these protections take the form of new limits on federal power that regulate certain state activities. Some cases limit Congress' ability to regulate any activity, including those of the states, under the Commerce Clause.<sup>25</sup> Others are designed to protect the states alone. These include cases that limit Congress' power to regulate pursuant to the Fourteenth Amendment.<sup>26</sup> Also included are cases invoking the Tenth Amendment and other limitations providing special state protection from legislation that is otherwise within the scope of federal legislative powers.<sup>27</sup>

Some of the cases protecting the states do not put their activity beyond regulation by the federal government, but rather limit the remedies that can be used to enforce valid regulations.<sup>28</sup> The state immunity cases are the focus

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24. The Justices are Scalia, Thomas, Rehnquist, O'Connor, and Kennedy.

25. See *United States v. Morrison*, 529 U.S. 598, 619 (2000) (holding the Violence Against Women Act went beyond Congress' powers under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding the Gun-Free School Zones Act of 1990 went beyond Congress' powers under the Commerce Clause). In these cases, the Supreme Court, for the first time in nearly sixty years, found that a federal statute regulating private activity exceeded Congress' powers under the Commerce Clause. See also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1911-12 (1995).

26. In Section One, the Fourteenth Amendment creates private rights in individuals against states that deprive them of due process, the equal protection of the laws, or the privileges and immunities of citizens of the United States. U.S. CONST. amend. XIV, § 1. Section Five provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. See cases cited *infra* note 56.

27. In *New York v. United States*, 505 U.S. 144, 180 (1992), the five current states' rights justices, this time joined by Justice Souter, invalidated federal regulation of the states that required states either to enact laws possessing a content specified by Congress or to assume large monetary liabilities. That decision was based on concern for the states' rights. See *id.* The Court's renewed interest in the early 1990's becomes clear from a comparison of *New York v. United States* with an earlier case, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556-57 (1985), which concluded that, with rare exceptions, the Court should not invalidate federal legislation, otherwise within Congressional power, simply because states are the objects of regulation and finding states' representation in the national political process is usually a sufficient protection of their interests.

28. Before considering the availability of remedies for state violation of duties imposed on them on behalf of private parties, it is important to understand the law concerning the



here. They limit the remedies available to enforce even those federal regulations of states that remain valid after the recent limitations. First, it is important to an understanding of *Maritime* to stress that actions against a state by the United States have never been covered by state immunity.<sup>29</sup> To the extent that the proceedings in *Maritime* were appropriately characterized as suits by the United States, as some of the parties claimed, they would not be precluded by immunity if brought in a court. If this is true, that may have a strong bearing on whether they should be barred when brought in a federal agency.<sup>30</sup>

Second, to the extent that the proceedings in *Maritime* were analogized to suits by private parties against states, the naming of the state as a party in the position of a defendant would be fatal to an action brought in federal court.<sup>31</sup> Under the current Supreme Court decisions, a suit against a “statewide agency,” such as the agency defendant in *Maritime*, is viewed as a suit against the state.<sup>32</sup> Furthermore, even if an officer, and not the state, were the named

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constitutionality of such duties themselves. The Court has vacillated as to whether and to what extent special rules, applicable only to regulation as it affects the states, apply as a result of the Tenth Amendment or implicit rules of Constitutional federalism. See *infra* note 220 and accompanying text. The last Supreme Court case dealing generally with this issue, *Garcia*, held that Congress can regulate the states under the Commerce Clause in the same way that it regulates individuals because the states’ indirect representation in the federal political process provides them with adequate assurance of a meaningful existence. *Garcia*, 469 U.S. at 555-57. Three Justices dissented, threatening to overturn *Garcia*. *Id.* at 557-89 (Powell, Rehnquist, O’Connor, JJ., dissenting). Since that case, the Supreme Court has prohibited certain very specialized forms of federal regulations of the states. However, *Garcia* remains the last pronouncement on most forms of such regulation and, as long as it lasts, it is permissive.

The state immunity cases assume that the states can be subjected to substantive duties on behalf of individuals, but bar an assertion of those rights directly against the states as defendants without their consent, and it bars them when brought against state officers if the relief sought is damages from the state treasury. The immunity cases, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999), are discussed *supra* note 7 and in the several paragraphs of text following this footnote.

29. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (holding that immunity bars suits against states by foreign states, while stating, in dictum, that no immunity exists for suits brought by the United States) (citing *United States v. North Carolina*, 136 U.S. 211, 216 (1890) (adjudicating on the merits a claim by the United States against the state on a debt)); see also *Kansas v. Colorado*, 206 U.S. 46, 84 (1907) (finding a suit by one state against another within the federal judicial power and not barred by state immunity, but dismissing on other grounds).

30. See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

31. See *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

32. See *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978) (requiring dismissal, on grounds of state immunity, of proceedings brought against Alabama and its Board of Corrections by current and former inmates seeking a mandatory injunction to improve prison conditions). See also RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S FEDERAL COURTS AND THE FEDERAL SYSTEM* 1056 (4th ed. 1996) [hereinafter HART & WECHSLER] (citing *Edelman*, 415 U.S. 459

defendant, that portion of *Maritime* in which a private party sought monetary compensation for a past wrong from the state treasury would also be barred if brought in court.<sup>33</sup> Because portions of *Maritime* are arguably private actions that would have been barred if brought in court, a rudimentary understanding of the states' immunity to suits by private parties is essential to analyzing *Maritime*. The rules applying to courts, however, would not be dispositive if agencies, when acting judicially, and courts are properly treated as sufficiently different for purposes of immunity.<sup>34</sup> Ultimately, the question becomes—given the mutual resemblance of federal courts and agencies and their greatly overlapping functions—do agencies differ sufficiently from courts to warrant an exception to the usual immunity rules for agency adjudication?

The state immunity cases are often described as “Eleventh Amendment cases” referring to a 1798 Constitutional Amendment that prohibits federal suits brought against unconsenting states by certain individuals—“[c]itizens of another state.”<sup>35</sup> The Amendment’s language does not bar suits against a state by its own citizens. But state immunity, in the current majority’s view, originates in something more primal than the text of the Eleventh Amendment and ranges well beyond the suits prohibited by that provision’s language.<sup>36</sup>

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(1974) (reversing that portion of a lower court decision permitting, in a lawsuit against state officers, an award of retroactive monetary compensation to be paid from a state’s treasury)). See *infra* note 204 and accompanying text.

33. *Edelman v. Jordan*, 415 U.S. 651 (1974) (“It is one thing to . . . [require a state officer to comply with federal law in the future.] It is quite another to order . . . [him] to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment . . .”) (citations omitted).

34. See *supra* notes 20-21 and accompanying text.

35. The Eleventh Amendment reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

36. First, the *Seminole Tribe* Court viewed the Eleventh Amendment as merely a correction of *Chisholm*’s mistaken view that the Constitution permits federal courts to hear suits against states brought by citizens of other states. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996) (“[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is ‘to strain the Constitution and the law to a construction never imagined or dreamed of.’ The text dealt in terms only with the problem presented by the decision in *Chisholm* . . .” (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 326 (1934) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)) (citations omitted)). Second, because no similar mistake had destroyed the original, implicit immunity protecting a state against any federal suit brought by its own citizens, that immunity continued to exist without need of support from a constitutional amendment. *Seminole Tribe*, 517 U.S. at 69. Thus, the *Seminole Tribe* majority believed that the Constitution’s original, implicit state immunity prohibited citizens of any state from bringing any federal court suit against a state. *Id.* at 67. The Court stated:

“[n]either the literal sweep of the words of Clause one of § 2 of Article III [permitting Congress to give federal courts jurisdiction over suits arising under federal law], nor the

Today, state immunity prohibits federal suits against unconsenting states brought by their own citizens and covers suits in state as well as federal court.<sup>37</sup>

Powerful arguments have been made that the Eleventh Amendment's prohibition on suits against a state by citizens of *another* state was not meant to apply to suits brought to enforce federal law.<sup>38</sup> This position has not been that of a majority of the Supreme Court. In *Hans v. Louisiana*,<sup>39</sup> the Court rendered a doubly significant decision holding that a suit brought *under federal law* against Louisiana *by its own citizens* was barred.<sup>40</sup> Thus, the Court not only rejected an exemption for suits based on federal law but extended immunity beyond the Amendment's literal scope.<sup>41</sup> *Hans* is a confusing

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absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a State may be sued without her consent."

*Id.* (quoting *Monaco*, 292 U.S. at 321).

37. See *Alden v. Maine*, 527 U.S. 706, 758-59 (1999).

38. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 290, *reh'g denied*, 473 U.S. 926 (1985) (Brennan, J., dissenting) Justice Brennan stated, as follows:

Article III grants a federal-question jurisdiction to the federal courts that is as broad as is the lawmaking authority of Congress. If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts — even if the defendant is a State. Neither Article III nor the Eleventh Amendment imposes an independent limit on the lawmaking authority of Congress. This view makes sense of the language, history, and purposes of Article III and of the Eleventh Amendment. It is also the view that was adopted in the earliest interpretations of the Amendment by the Marshall Court.

*Atascadero State Hospital*, 473 U.S. at 290 (Brennan, J., dissenting). Substantial scholarship cited in Justice Brennan's opinion supporting the view that the Eleventh Amendment was not meant to prohibit suits asserting federal causes of action. *Id.* at 259 n.11. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1130 (1983) ("[T]he amendment left both admiralty and federal question jurisdiction to operate according to their own terms, authorizing federal courts to entertain private citizens' suits against the states whenever based on valid substantive federal law."); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) ("It is time for the Supreme Court to acknowledge that the Eleventh Amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status.").

39. 134 U.S. 1 (1890).

40. *Id.* at 20-21 (holding that each state possesses immunity from a suit brought against it by one of its citizens in federal court based on federal law).

41. The amendment only prohibits suits against a state by "Citizens of *another* state." U.S. CONST. amend XI (emphasis added). *Hans* was a suit against Louisiana by one of its own citizens. *Hans*, 134 U.S. at 20-21.

opinion<sup>42</sup> and the first clear explanation of the existence of state immunity beyond the Amendment's provisions, which came in 1995 as part of the new set of states' rights opinions.<sup>43</sup>

*Seminole Tribe v. Florida*<sup>44</sup> makes clear the current states' rights majority's view that an implicit part of the original constitutional understanding was that states possessed immunity from suits brought by private parties in federal court to enforce either state or federal law.<sup>45</sup> In other words, state immunity, among other things,<sup>46</sup> is an unstated limitation on Article III. Specifically, it is a limitation on what would otherwise be within federal courts' jurisdiction under the federal judicial power. Under these limitations, despite any apparently contrary language in Article III appearing to grant jurisdiction over such suits, individuals could not sue either states or statewide agencies in federal court and certain suits against state officers seeking damages were barred even if a state was not named.<sup>47</sup> This immunity

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42. While a careful reading of most Supreme Court opinions on the subject makes clear that *Hans* immunity is not based on the Eleventh Amendment, a casual reader could easily be confused by isolated passages. For example, the Court stated: "[T]hus, in *Hans v. Louisiana*, the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the [Eleventh] Amendment do not so provide." *Atascadero*, 473 U.S. at 238. "Whether Illinois permits such a suit to be brought against the State in its own courts is not determinative of whether Illinois has relinquished its Eleventh Amendment immunity from suit in the federal courts." *Edelman v. Jordan*, 415 U.S. 651, 678 n. 19 (1974) (citations omitted). That *Edelman* more properly involved *Hans* immunity and not Eleventh Amendment immunity is evident from the fact that *Edelman* was not a suit against a state by citizens of different states, as the Amendment specifies, but was a suit against Illinois by its own citizen-welfare recipients. This seems implicit in the Supreme Court opinion in *Edelman*, but is even clearer in the opinion of the court below. See *Jordan v. Weaver*, 472 F.2d 985, 990 (7th Cir. 1973).

Passages in *Hans* itself can easily be mistaken as statements that a state's immunity from suits by its own citizens comes from the Amendment although a more careful reading would convince otherwise. See *Hans*, 134 U.S. at 10-12.

43. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (5-4 decision) (overruling an earlier case that allowed Congress to abrogate state immunity when imposing duties on states in legislation supported only by the Indian Commerce Clause, clarifying the Court's view that state immunity is based on an implicit original constitutional understanding, and finding the normal injunctive remedy against state officers who act unconstitutionally preempted by a special remedy created by Congress under the Indian Gaming Act, despite the Court's having ruled that remedy unconstitutional and thus leaving the plaintiffs without direct recourse in enforcing their rights).

44. 517 U.S. 44 (1996).

45. *Id.* at 72.

46. It is also a limitation on what would otherwise be a state's obligation to enforce federal law in its own courts under the Supremacy Clause. See *Alden v. Maine*, 527 U.S. 706, 732 (1999).

47. Suits against states and state agencies as named parties are barred by state immunity, regardless of the relief sought. See *Alabama v. Pugh*, 438 U.S. 781, 781-82, *cert. denied*, 438 U.S. 915 (1978). Suits seeking damages from the state treasury are also barred, even if an officer,

was constitutionally hard, meaning that it would not yield to congressional attempts to abrogate it, except where such attempts were part of legislation properly enforcing the Fourteenth Amendment.<sup>48</sup> The latter was, and possibly the other Reconstruction Amendments were, viewed as overriding the original state immunity to the extent necessary to enforce legislation implementing its requirements that states accord due process and equal protection and honor the privileges and immunities of citizens of the United States.<sup>49</sup>

In 1992, in *Pennsylvania v. Union Gas Co.*,<sup>50</sup> the Supreme Court expanded Congress's powers of abrogation, so that immunity could be overridden, not just when Congress legislated under the Reconstruction Amendments, but when it acted under the Commerce Clause and presumably other federal legislative powers as well.<sup>51</sup> After *Union Gas*, Congress, by clear statement, could make states accountable in federal court to private individuals for violation of any duty that Congress had the substantive authority to impose on them.<sup>52</sup> This was true whether the duty was enforceable by injunction or by an action for monetary compensation, whether the state or just an officer was named defendant, and whether the duty ran to the federal government or to private parties as beneficiaries.

In *Seminole Tribe*, the states' rights majority inaugurated a new wave of immunity cases by, among other things, overruling *Union Gas*.<sup>53</sup> Thus, the *Seminole Tribe* majority opinion once again limited congressional overrides of state immunity to those circumstances where necessary to enforce the Reconstruction Amendments.<sup>54</sup> *Seminole Tribe* also suggested the possibility that the Court would recognize new and confining restrictions on suits against

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not the state itself or a statewide agency, is sued. See HART & WECHSLER, *supra* note 32, at 1056 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974) (reversing that portion of a lower court decision permitting, in a lawsuit against state officers, an award of retroactive monetary compensation to be paid from a state's treasury)).

48. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'") (quoting *Hans*, 134 U.S. at 15).

49. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), *rev'd without opinion* 573 F.2d 1292 (2d Cir. 1977) (concluding that "Congress may, when enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.") (footnote omitted).

50. 491 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

51. *Union Gas Co.*, 491 U.S. at 5 (5-4 decision) (holding that, when legislating pursuant to the Commerce Clause, Congress has power to create a cause of action in favor of a private party against a state for monetary damages).

52. The *Seminole* Court overruled *Union Gas Co.*, which permitted abrogation under the Interstate Commerce Clause. *Seminole Tribe*, 517 U.S. at 72-73.

53. *Id.*

54. *Id.*

state officers to prospectively enforce federal law, suits the Court had long exempted from state immunity.<sup>55</sup> Within a few years after *Seminole Tribe*, the states' rights majority moved to limit, but not eliminate, congressional overrides under the Fourteenth Amendment. The method used was the imposition of highly restrictive limits on Congress' power to act at all under Section 5 of the Fourteenth Amendment.<sup>56</sup> Valid enforcement measures might be prophylactic to some extent, but they must be tightly tailored to stop repeated violations of the Amendment as interpreted by the Court.<sup>57</sup>

Another group of cases dealing with state immunity is crucial to any understanding of *Maritime*, particularly the portion dealing with the injunctive-style relief also barred by Justice Thomas' opinion. These cases limit state immunity by excluding certain injunctive actions from the definition of suits against states.<sup>58</sup> Before 1976, when the Court first allowed abrogation of state immunity under the Fourteenth Amendment, there existed an especially delicate problem of squaring state immunity from suit with the fact that states are subject to duties imposed on them by federal statutes and constitutional

55. *Id.* at 73 n.16 (discussing statutory preemption of the usual injunctive remedy). *See also* Young *supra* note 7, at 1436 (criticizing this limitation of the usual remedy).

56. In *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630, *aff'd* by 527 U.S. 666 (1999), the Court confronted a patent infringement claim against the State of Florida. The majority rejected Congress's attempt to expose states to such suits but recognized that patent rights were property rights whose violation might allow congressional authorization of a suit against an offending state in an appropriate circumstance. *Id.* at 637-46. Among other things it was (1) the lack of evidence of systematic and intentional violation of federally created property rights, and (2) the lack of evidence that state law remedies were inadequate that caused the Court to find no deprivation of property cognizable under the Fourteenth Amendment and, thus, no power of Congress, under Section 5 of that Amendment, to abrogate immunity as an appropriate way of enforcing the Amendment itself. *Id.* Finally, in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 92 (2000), a majority of the Court found that the provisions of the Age Discrimination in Employment Act of 1967 purporting to abrogate state immunity were beyond Congress' powers of remediation under Section 5 of the Fourteenth Amendment. *See* *Bd. of Trs. Univ. of Alabama v. Garrett*, 531 U.S. 356 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

57. All of the opinions concluding that Congress exceeded its powers under Section 5 of the Fourteenth Amendment recognized that "enforcement" may include creation of prophylactic rules going beyond the constitutional rights themselves in order to insure satisfactory enforcement of the latter. However, all of them assumed that definition of the central constitutional rights themselves was a job solely for the Court alone and that it was only those Court-defined rights that Congress might enforce, even if somewhat prophylactically.

58. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908) ("[I]ndividuals who, as officers of the State . . . threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."); *see also Seminole Tribe*, 517 U.S. at 52-57 (recognizing the validity of federal court suits brought by private parties to force state officers' prospective compliance with federal law, although recognizing that specific federal laws may implicitly preclude such suits by providing alternative remedies).

provisions. This is particularly clear in the case of the Fourteenth Amendment, which is directed at creating private rights only against states and in favor of individuals who claim state violations of due process, equal protection and the privileges and immunities of citizens of the United States.<sup>59</sup> Without some sort of compromise, these would have been nearly rights without remedies.<sup>60</sup> There would have been few remedies for violation of these rights before the Supreme Court recognized Congressional power to abrogate state immunity in 1976.<sup>61</sup> Outside of the civil rights context, a compromise was acutely needed to enforce duties imposed on states for the benefit of individuals by Congress under the Commerce Clause. Such duties generally are permitted by current case law, but suits for compensation from the treasury or any relief against the state as a named party have been impossible, except for the roughly half-decade interlude under *Union Gas*.<sup>62</sup>

The compromise solution was worked out at least by the end of the first decade of the twentieth century. *Ex parte Young*<sup>63</sup> holds that suits against state officers to enjoin them from violating federal law are considered suits against the officers and not the state itself and, thus, are not barred by state

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59. In relevant part, the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

60. The Fourteenth Amendment could have been used as a defense to criminal and civil suits brought by states against private parties. For example, assertion of the First Amendment or procedural due process in a criminal or civil proceeding brought by the state would not itself be a barred suit. However, preemptive suits to stop such action or to stop states from harming individuals without the use of the courts, would have gone without a federal judicial remedy. After *Alden*, without a federal requirement, state courts supply such a judicial remedy. See *Alden v. Maine*, 527 U.S. 706, 751-56 (1999).

61. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976). Before *Fitzpatrick*, Fourteenth Amendment rights could have been enforced as defenses to criminal proceedings and civil suits brought by states and in suits under the *Ex parte Young* doctrine seeking to enjoin officers from prospective violations of federal law. See *id.* at 458-59. Until *Alden*, it remained an open question whether state courts could, despite the Supremacy Clause, decline federal rights suits against their own sovereigns on immunity grounds. In 1999, *Alden* made clear that such immunity exists in state courts. *Alden*, 527 U.S. at 713. These possibilities aside, federal court suits against states as named defendants and those against state officers seeking, in effect, damages from state treasuries from past wrongs, were barred.

62. Because abrogation of immunity can be accomplished by Congress only when it acts under a Reconstruction Amendment, most economic regulation of states has been forbidden enforcement by damage suits or by any remedy against the state as a named party. Abrogation under the Commerce Clause and other original powers was possible during the roughly half-decade between the decision of *Union Gas* and that of *Seminole Tribe*. See *supra* notes 48-53 and accompanying text.

63. 209 U.S. 123 (1908).

immunity.<sup>64</sup> This is true even though the officers are faithfully enforcing state policy made by the state legislature or constitutional convention.<sup>65</sup> When these suits interfere with enforcement of official policy made by state legislatures and agencies, and not just with rogue action by state officers, they are, in reality, suits against states. Policy moves from the books to the world only by the intermediation of officers. The Supreme Court has acknowledged as much, admitting that *Ex parte Young* is a fiction, designed to permit the most urgent of suits aimed at state action in violation of federal law.<sup>66</sup>

The Court, however, has drawn the line at federal court suits against state officers seeking to restrain future violations of the law. Injunctions against states as named parties are prohibited, as are suits against officers in their official capacities to recover state funds as compensation for past wrongs, even though care is taken not to name the state itself as a party.<sup>67</sup> To recapitulate: (1) one cannot sue in federal court to recover damages against state funds to compensate for past wrongs, no matter who is named defendant or the

64. See *supra* note 58 and accompanying text.

65. *Ex parte Young* involved a suit to enjoin state officers from enforcing an otherwise duly enacted state law on the grounds that it violated the Fourteenth Amendment. *Ex parte Young*, 209 U.S. at 142-43.

66. In subsequent case law reviewing the opinion, the Court stated:

[T]he injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is “stripped of his official or representative character.” This rationale, of course, created the “well-recognized irony” that an official’s unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to “the supreme authority of the United States.” As Justice Brennan has observed, “*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.” Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan*. We recognized that the prospective relief authorized by *Young* “has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect.” But we declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States.

*Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-05 (1984) (emphasis added) (citations omitted); see also PETER W. LOW & JOHN C. JEFFRIES, JR., *CIVIL RIGHTS ACTIONS: SECTION 1983 AND RELATED STATUTES* 871 (2d ed. 1994) (characterizing *Ex parte Young* as resting “on a fictional tour de force.”).

67. See *Edelman v. Jordan*, 415 U.S. 651, 663, 666-71 (1974) (citing *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573 (1946); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944)).



technical nature of the remedy, (2) federal court injunctions seeking to restrain state officers from future violation of federal law are permitted, but (3) injunctive or even damage suits against states as named parties are allowed if a state consents to them or Congress appropriately abrogates state immunity by providing a remedy for a violation of the Fourteenth Amendment. In 1999, the Court, in effect, extended these rules to protect states against suits in their own courts.<sup>68</sup> *Alden v. Maine*<sup>69</sup> held that states need not provide state court fora to suits against them that would not be permitted in federal court.<sup>70</sup>

Before considering how these rules of state immunity and underlying policies bear on the *Maritime* case, this article considers a separate line of cases—those bearing on federal adjudication outside of the Article III courts. For the question in *Maritime* concerns whether and how the rules, principles, and policies of immunity described above should apply to adjudications in federal administrative agencies.

### *Agency Adjudication*

Article III of the Constitution provides that the “judicial power of the United States shall be vested” in a Supreme Court and lower federal courts (“Article III courts”) whose judges, once confirmed, have some insulation from political pressure.<sup>71</sup> Such judges possess life tenure and protection from reduction in salary during their terms in office.<sup>72</sup> The “judicial power” is defined to include the power to adjudicate the following disputes, among others, that are relevant to state immunity and to *Maritime*:

[1] all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies [2] to which the United States shall be a Party . . . [3] between two or more States [4] between a State and Citizens of another State . . .<sup>73</sup>

68. See *Alden v. Maine*, 527 U.S. 706 (1999), 527 U.S. at 706 (holding that state immunity permits states to refuse to provide state judicial fora to hear suits against states under federal law despite a general requirement that state courts entertain suits arising under federal law in cases not involving the state as a defendant).

69. *Id.* at 712.

70. *Id.*

71. U.S. CONST. art. III, § 1. In full, Article III, Section 1 states:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

*Id.*

72. *Id.*

73. *Id.* at § 2, cl. 1. That provision contains other controversies as well. In full, it reads: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

Given that such disputes are part of “*the* judicial power of the United States” and that Article III vests that power in the constitutionally protected Article III courts, it would be natural to conclude that, if a such a dispute is to be adjudicated before a federal judicial tribunal, then that tribunal must be an Article III court. The Constitution vests the “judicial power” nowhere else. Despite the force of the Constitutional text, the Court has allowed numerous exceptions to Article III’s apparent requirements.<sup>74</sup>

Some of these exceptions were clearly established by the middle of the nineteenth century and have been viewed as justified by the Constitution’s text and original contextual understanding.<sup>75</sup> Some exceptions were justified as implicit; these permitted non-Article III courts to hear cases arising in territories<sup>76</sup> of the United States and court martial cases.<sup>77</sup> Early on, there were suggestions, later confirmed, that non-Article III courts could be established for the District of Columbia.<sup>78</sup>

A third set of exceptions, for cases involving public rights, always has been of uncertain scope and significance.<sup>79</sup> These cases involved not just adjudication by non-Article III bodies dressed up as courts, but also by executive branch agencies or, in the language of the origins of this body of law, executive “departments.”<sup>80</sup> These cases and their mutating successors provide the best support for arguments in Justice Breyer’s *Maritime* dissent

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under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*

74. See Young, *supra* note 21, at 789-794 (tracing the development of various exceptions permitting federal adjudication outside of Article III).

75. N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 64-66 (1982) (plurality opinion). The opinion states:

Appellants next advert to a second class of cases — those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts-martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.

*Id.* at 66. See also Young, *supra* note 21, at 769.

76. See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

77. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

78. See *Palmore v. United States*, 411 U.S. 389, 405 (1973) (permitting such legislative courts for the District of Columbia and discussing earlier cases presaging this decision).

79. See Young, *supra* note 21, at 847-51.

80. *Id.*

that state immunity is generally inapplicable to agency proceedings.<sup>81</sup> Whether that support is sufficient is discussed later in this article.<sup>82</sup> What follows below is a brief summary of the cases.

The public rights line of cases began with adjudication by executive departments, entities that would today be considered administrative agencies governed by the Federal Administrative Procedure Act of 1946.<sup>83</sup> Perhaps the best understanding of these cases, from their origin in 1855 to the time just preceding the New Deal and the beginning of the modern administrative state, is that such cases involved government benefits.<sup>84</sup> That was a time before the development of the doctrine of unconstitutional conditions.<sup>85</sup> Consequently, government benefits—such as land grants and military pensions—could be offered on the condition that any one claiming eligibility waive their right to litigate claims of entitlement in a court.<sup>86</sup> Instead, the executive department would find any facts pertaining to entitlement, subject only to federal-court review for agency mistakes of law and for agency findings of fact that were egregiously erroneous given the record of proceedings.<sup>87</sup>

So the Interior and War Departments could offer land grants on the condition that anything that resembled a judicial dispute over such entitlements must be decided in the department with only the skimpiest judicial review in the federal courts.<sup>88</sup> Slowly such cases metamorphosed to permit adjudication in cases that more resembled regulation of private interests, although government largess remained in the background, as in the regulation of railroads, which received large amounts of their roadbed from the federal government.<sup>89</sup>

By 1931, the public rights cases crossed a significant line in *Philips v. Commissioner*.<sup>90</sup> In that case, the Court concluded that, in a tax-liability dispute between the federal government and a private citizen, findings of the Commissioner of Internal Revenue had been made “final” by statute and could not be overturned by a reviewing court if supported by any evidence. In the

81. Fed. Mar. Comm’n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1885-88 (2002) (Breyer, J., dissenting).

82. See *infra* note 176-202 and accompanying text.

83. See Young, *supra* note 21, at 791; see also Administrative Procedure Act, 5 U.S.C. § 551 (2000).

84. Murray’s Lessee v. Hoboken Land Co., 59 U.S. (18 How.) 272, 284 (1855). See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69-70 (1982). The “public rights” doctrine was first set forth in *Murray’s Lessee*, 59 U.S. (18 How.) at 284.

85. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1457-76 (1989) (describing and offering a critique of the existing unconstitutional conditions doctrine).

86. See Young, *supra* note 21, at 769.

87. *Id.* at 805, 815, 816.

88. *Id.* at 799.

89. *Id.* at 805-07.

90. *Philips v. Comm’r*, 283 U.S. 589 (1931) (discussed in Young, *supra* note 21, at 835-37).

following year, in *Crowell v. Benson*,<sup>91</sup> (repeatedly cited in Justice Breyer's *Maritime* dissent<sup>92</sup>) these public rights cases were distinguished from "private rights cases" such as *Crowell* itself.<sup>93</sup> The latter were said to involve the liability of one private party to another.<sup>94</sup> Viewed another way, that would include *Maritime*, as private rights cases were those involving the federal government as providing a tribunal but not itself as a party.<sup>95</sup> *Crowell* and *Phillips*, decided a year apart, suggest a broad view of public rights cases, those in which Article III's requirements were most relaxed. They suggest that public rights cases may include all non-criminal cases in which the United States asserts a claim under a federally created regulatory scheme.<sup>96</sup> For such

91. *Crowell v. Benson*, 285 U.S. 22 (1932). See also *Commodity Futures Trading Co. v. Schor*, 478 U.S. 833 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

92. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1881-90 (2002).

93. *Crowell*, 285 U.S. at 51. In relevant portion, this case states:

The present case does not fall within [the public rights category] just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.

*Id.*

94. *Id.*

95. Public rights cases involved the federal government proceeding, in civil cases, before its own tribunals to enforce its own laws. *Crowell* describes the other category as "private rights" cases involving the "liability of one individual to another," but it did not consider how a proceeding against a state in a federal tribunal should be classified. *Id.* Such suits are necessarily rare because of state immunity and were rarer still before Court decisions in the late 1930's greatly expanded the scope of federal legislative powers under the commerce clause. I believe that had the *Crowell* court considered a case such as *Maritime*, it would have been viewed as outside the public rights category and equivalent to a private rights suit. There is no reason that the "public" nature of the defendant state alone should locate a suit against it in the public rights category where compromises with the literal requirements of Article III are most easily justified.

96. I base this conclusion on aspects from the two cases. *Crowell* describes itself as a case involving private rights, "the liability of one individual to another under the law as defined" in apparent contrast with the public rights cases the opinion had just discussed and distinguished. *Id.* at 50-53. Before *Phillips v. Commissioner*, 283 U.S. 589 (1931), and certainly before the Interstate Commerce Clause cases, one might have thought that public rights cases involved only government benefits. See Young, *supra* note 21, at 835-41. *Phillips* allowed the government to use its agencies as trial courts in regulating private activity, particularly in making claims against the private property of individuals under the tax laws. *Phillips*, 283 U.S. at 595-602. It is possible to argue formalistically that the "private rights" doctrine pertained only to the validity of adjudication by legislative courts, not that of agencies. Such a distinction between two types of non-Article III adjudicating bodies seems, at best, flimsy and, at worst, unreal. By the time of *Phillips*, the federal government had become free to provide many civil trials under federal law only in expert tribunals not protected by Article III's political insulation for judges. See *id.* at 598.

cases, federal agencies and Article I courts were most widely available and subject to the fewest restrictions.<sup>97</sup>

At this point the public rights doctrine was potentially huge, but greatly limited in context by the Supreme Court's view at the time that many federal regulatory schemes were substantively unconstitutional. The Court then often concluded that such regulation violated property or liberty rights protected by substantive due process, exceeded Congress' powers under the Interstate Commerce Clause, or involved unconstitutional delegations of legislative powers.<sup>98</sup> The tax scheme involved in *Phillips*, by contrast, was within an island of clear federal power guaranteed by a relatively recent constitutional amendment permitting federal taxation of income.<sup>99</sup>

*Phillips* is a public rights case. *Crowell*, exemplifying the other category of cases involving private rights, is an interesting case in ways that bear on *Maritime*.<sup>100</sup> It involved a federal workers' compensation scheme in which a federal agency (the United States Employees' Compensation Commission) provided a forum for disputes between two parties, neither of which was any part of the federal government.<sup>101</sup> *Maritime* may be seen as a similar case. In *Crowell*, the dispute was between an individual and his employer, while in *Maritime*, the dispute involved a private business and a state. Because of the *Crowell* court's view that private disputes require more exacting Article III protections than the workers' compensation statute provided, it simply denied that the statute had placed the proceeding that it reviewed outside of the Article III courts. *Crowell* regarded the federal agency whose decision it reviewed as an adjunct to the Article III courts. The agency was analogized to masters and commissioners who sift through complicated and often highly technical facts as agents for an Article III court that ultimately decides a case.<sup>102</sup>

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97. See Young, *supra* note 21, at 835-41.

98. The Supreme Court used three principal doctrines to limit economic and social legislation during the late nineteenth and early twentieth century. These included: (1) substantive due process, (2) a limited reading of Congress' powers under the Interstate Commerce Clause, and (3) the doctrine severely limiting delegation of legislative powers to federal administrative agencies. For the story of these limits and their falling away after a series of Franklin Roosevelt appointments to the Court in the late 1930s and early 1940s, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.7 at 151-55 (5th ed. 1995), and ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 14 (1997).

99. U.S. CONST. amend. XVI (authorizing a federal income tax and thereby negating *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (finding a federal income tax not apportioned to representation unconstitutional because apportionment according to representation was required, in the Court's view, by Article I, Section 9, paragraph 4 of the Constitution of 1789)).

100. *Crowell*, 285 U.S. at 36-38.

101. *Id.*

102. The Court in *Crowell* stated:

Now, this way of avoiding a conclusion that agency adjudication violated Article III clearly was a fiction. In workers' compensation cases such as *Crowell*, federal courts were required to enforce Commission orders after exercising only the slightest review, much less review than an appellate court would exercise over the decision of a trial court.<sup>103</sup> Article III vests the judicial power, including the power to try federal cases originally, in a set of courts with specific protections. For cases such as *Crowell*, the only federal trial occurred before an agency, and the agency's findings of fact were subject to much less Article III supervision than were such findings of federal district courts subject to review in the courts of appeals.<sup>104</sup>

But it is important to note a number of things. First, the theory: the *Crowell* Court was extremely concerned with cosmetically preserving Article III values in what it saw as part of the core of Article III—private dispute resolution within the federal judicial power.<sup>105</sup> Hence, the rhetoric that those Commission adjudications were really decided by Article III courts with the agency as an adjunct to the courts.<sup>106</sup> Second, the reality: given the extremely narrow scope of judicial review of Commission decisions, what was really happening was that the Constitution was being bent, under the pressures of early modern government, to permit the transfer of some federal trials to executive branch agencies.<sup>107</sup> Third, theory meets reality: the narrow judicial review is more than cosmetic for it helps to balance Article III's textual claims against the forces of modernization by retaining some power in the Article III courts.

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On the common law side of the Federal courts, the *aid* of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty it is historic practice to call to the assistance of the courts without the consent of the parties, masters and commissioners, or assessors, to pass upon certain classes of questions. For example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence. In the absence of errors of law, the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were anciently in use not only in criminal cases but apparently in civil cases also.

*Id.* at 51-52 (emphasis added). *Crowell's* theory that the federal agency was simply an aid to the federal court that would ultimately decide the matter led to the latter characterization of agencies, at least in private rights cases, as "adjuncts" to the federal courts. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-77 (1982).

103. *See* Young, *supra* note 21 at 840-56.

104. *Id.* at 860-61 (concluding that the standard of judicial review of agency factual conclusions that was applied under the statute in *Crowell* was much more forgiving of agency error than is the "clearly erroneous standard" used by federal courts of appeals to review district court findings of fact.).

105. *Crowell*, 285 U.S. at 87.

106. *Id.*

107. *See* Young, *supra* note 21, at 789-806.

Since *Crowell*, the Supreme Court has never questioned the general legitimacy of agency adjudication of cases arising under federal enabling acts and subject to Article III court review of issues of law and very narrow review of findings of fact.<sup>108</sup> After *Crowell*, in a series of cases in the 1980s, the Supreme Court dealt with some specialized issues. This began with a plurality opinion in *Northern Pipeline*,<sup>109</sup> a case striking down adjudication by a non-Article III Bankruptcy Court of certain claims under state tort and contract law by a bankrupt's estate against third parties.<sup>110</sup> The plurality, echoing *Crowell*, suggested that at least two sorts of legal claims were especially protected under Article III so that in some circumstances some non-Article III adjudication of them might be inappropriate.<sup>111</sup> These were constitutional claims and private disputes under state law of the sort that could be heard in federal court under diversity jurisdiction.<sup>112</sup> It further indicated (1) that, where such sensitive non-Article III adjudication is permitted, either special justification and/or special protections (often more intensive judicial review) is required, but (2) that in other cases, (such as public rights cases) non-Article III adjudication needs the least justifications and safeguards.<sup>113</sup>

The *Northern Pipeline* plurality also suggested that non-Article III adjudication is more problematic in a body dressed up like a court—an Article I or “legislative” court—than it is in an agency.<sup>114</sup> The plurality still clung, at least nominally, to *Crowell*'s characterization of administrative agencies as “adjuncts” of the federal courts.<sup>115</sup> The distinction between agencies and adjuncts, which is always flimsy, was quickly downplayed in cases decided after *Northern Pipeline*, as was a powerful distinction between public and private rights cases.<sup>116</sup> In place of such stark dichotomies the Court employed a multi-factor balancing test dealing with the same issues of need for adjudication outside of Article III, the nature of the claims considered, and the amount of review available in an Article III court.<sup>117</sup>

108. Harold Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN L. REV. 329, 352-57 (1991).

109. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52 (1982).

110. *Id.* at 52-54.

111. *Id.* at 67-72.

112. *Id.*

113. *Id.*

114. *See N. Pipeline Constr. Co.*, 458 U.S. at 50. *But see* Kenneth Karst, Poetry, *Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229, 230 (1979) (suggesting that there is no real difference between agencies that adjudicate and Article I courts such as the Bankruptcy Court, ruled unconstitutional in *Northern Pipeline* and that “[l]egislative courts are but agencies in drag . . .”) (emphasis added).

115. *N. Pipeline Constr. Co.*, 458 U.S. at 78.

116. *See Young*, *supra* note 21, at 840-862.

117. *See Thomas v. Union Carbide Agricultural Product Co.*, 473 U.S. 568 (1985). The Court stated:

In determining the extent to which . . . adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules . . . . Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary . . . . Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>118</sup>

These passages provide a rationale for the transfer of some judicial power from the federal courts to other bodies. They resemble the law that developed to permit and limit another relaxation of originally-separated powers—the transfer of legislative power to agencies.<sup>119</sup> Thus, they reflect a compromise between the necessities of modern government and the original values underlying the vesting of the federal judicial power in Article III courts. This concludes a brief history of the case law authorizing federal adjudication outside of Article III's strictures. Where does it leave *Maritime*?

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This theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee v. Hoboken Land & Improvement Co.* provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree. Nor did a majority of the Court endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the Government and an individual. . . .

. . . .

The enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III. The extent of judicial review afforded by the legislation reviewed in *Crowell* does not constitute a minimal requirement of Article III without regard to the origin of the right at issue or the concerns guiding the selection by Congress of a particular method for resolving disputes . . . .

*Id.* at 585-87 (citations omitted).

118. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (citations omitted).

119. For a discussion of the Court's willingness since the late 1930s to allow Congress to delegate large amounts of legislative power to executive branch agencies with relatively little guidance, see *infra* notes 172-75 and accompanying text.



THE *MARITIME* CASE

With respect to *Maritime*, the important point is what the entire line of cases dealing with non-Article III federal adjudication does not do. Such cases provide no reason to deny (1) that powers vested by the Constitution in the judiciary have been transferred to the executive branch in ways resembling the concomitant and parallel transfer of legislative powers to that branch, (2) that such a transfer requires justification and reasonable doctrinal safeguards to balance the justifications for change against the values inherent in the original division of powers, and (3) that any safeguards applying to limit the original custodians of a power in the exercise of such power should be applied to the transferee unless the inherent necessities make such continuation not practicable. In short, the presumption should be that federal power to adjudicate is limited by state immunity doctrine even when the locus of that power spreads from Article III courts to legislative courts and agencies.

To provide a concrete parallel example: even if the First Amendment had not been viewed as applying beyond the scope of its text<sup>120</sup> to cover executive branch actions,<sup>121</sup> it would most reasonably be seen as a limit running with the legislative power so as to apply to any transferee. The same is true of any state immunity law that limits the use of federal judicial power against states. A mere transfer of forum, even if sanctioned by modern separation of powers jurisprudence, should not suffice to extinguish those limits. If they are to be extinguished, that must be justified by unique aspects of non-Article III adjudication that distinguish that process from adjudication in federal courts.

Such a stripping away of state immunity would, for example, have to be justified by attributes of the new repositories of the judicial power. Once again, the issue concerns constitutional costs and benefits, loss of faithfulness to the text versus the necessities of modern government, and safeguards minimizing the tension between the two.

First, is there less need for state immunity in agencies than in courts so that Article III and state immunity values are not as threatened by adjudication in agencies as they would be in court proceedings? Here the question is whether states' liability at the hands of federal agencies is appreciably less threatening to the dignitary and fiscal interests of states stressed as the underpinnings of state immunity in the immunity cases and particularly in *Maritime*. Do agencies offer safeguards that reduce the above threats to an acceptable level, but that are not present in court proceedings?

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120. The First Amendment begins "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech . . .*" U.S. CONST. amend. I (emphasis added).

121. For example, all of the opinions in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), assumed that the First Amendment restricts otherwise discretionary action by the executive branch that unduly represses speech.

Second, even if agency proceedings present the same threats to state interests underlying immunity, would applying such immunity to federal agency adjudications pose sufficiently greater harm to federal interests to warrant not applying it? Would applying state immunity to agency adjudication interfere with the vitality of modern government in ways sufficiently greater than would the recognized immunity to judicial proceedings?

Any comparison of state immunity in the two contexts must consider the balance of such differential costs and benefits, if they exist. Although it is surprisingly less than clear, Justice Breyer's *Maritime* dissent ultimately seems to justify exemption of agency proceedings from immunity not on increased protections present in agency adjudication, but rather on immunity's negative effects on special benefits of governance provided by agencies.<sup>122</sup> After a section describing the *Maritime* case itself, this article will turn to a consideration of the force of arguments for and against assimilation of agency proceedings to those of courts.

#### *The Proceedings in the Agency and Lower Court*

The *Maritime* case arose out of the several attempts, all rebuffed, of a private corporation, South Carolina Maritime Services ("Cruise Line"), to gain permission from the State of South Carolina to berth a ship at the state's facilities at the Port of Charleston.<sup>123</sup> South Carolina, acting through its agency, State Port Authority ("Port Authority"), refused permission on grounds that its established policy was to deny such facilities to "vessels whose primary purpose is gambling."<sup>124</sup> Cruise Line then filed a complaint against the state in the Federal Maritime Commission ("FMC"), an agency of the federal government, alleging discrimination against it under the FMC's enabling act, the Federal Shipping Act.<sup>125</sup> The allegations were that the Port Authority had refused to negotiate with Cruise Line and had discriminated against it by granting facilities to other shipping companies with gambling facilities.<sup>126</sup> The remedies sought included injunctive relief and financial compensation, both for lost profits and for attorneys' fees.<sup>127</sup>

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122. See *infra* notes 176-182 and accompanying text.

123. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1868 (2002).

124. *Maritime*, 122 S. Ct. at 1868.

125. *Id.* at 1868-69.

126. *Id.* at 1868.

127. More specifically, the Cruise Line sought:

"(1) . . . a temporary restraining order and preliminary injunction in the United States District Court for the District of South Carolina 'enjoining [the SCSPA] from utilizing its discriminatory practice to refuse to provide berthing space and passenger services to Maritime Services;' (2) [an order directing] the SCSPA to pay reparations to Maritime Services as well as interest and reasonable attorneys' fees; (3) . . . an order commanding,

FMC referred the complaint to an administrative law judge (“ALJ”) before whom Port Authority both interposed an answer on the merits and maintained that, as an arm of the state, it is entitled to immunity from administrative proceedings under the Supreme Court’s precedents dealing with the Eleventh Amendment and related doctrines.<sup>128</sup> The ALJ agreed with the latter contention and ordered the proceedings dismissed.<sup>129</sup> Cruise Line did not appeal the dismissal of its complaint, but the Federal Maritime Commission, on its own motion, reinstated the complaint concluding that state immunity did not apply to agency adjudicatory proceedings.<sup>130</sup> The Port Authority immediately appealed to the United States Court of Appeals for the Fourth Circuit, which reversed, concluding that state immunity applied to judicial-style proceedings, whether in court or in agencies.<sup>131</sup>

### *The Supreme Court Opinions*

Justice Thomas’s opinion for the majority reiterated support for the state-protective rules recognized in the existing line of immunity cases and for the notion of a primal state immunity that was a powerful, if only implicit, part of the original constitutional understanding. As a consequence, state immunity existed before, and extends far beyond, the Eleventh Amendment’s restrictions so as to include, among other things, all private suits against states. Justice Thomas stated:

Dual sovereignty is a defining feature of our Nation’s constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union “with their sovereignty intact.”

. . . .

. . . the [Constitutional] Convention did not disturb States’ immunity from private suits, thus firmly enshrining this principle in our constitutional framework . . . .

Instead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to “address the specific provisions of the Constitution that had raised concerns during the ratification

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among other things, the SCSA to cease and desist from violating the Shipping Act; and (4) award Maritime Services ‘such other and further relief as is just and proper.’”

*Id.* at 1868-69 (footnotes citation omitted).

128. *Id.* at 1869. For a discussion of the Eleventh Amendment and the wider state immunity from suit currently recognized by the Supreme Court, see *supra* notes 24-70 and accompanying text.

129. *Maritime*, 122 S. Ct. at 1869.

130. *Id.*

131. *Id.* at 1869-70.

debates and formed the basis of the *Chisholm* decision.” As a result, the Eleventh Amendment does not define the scope of the States’ sovereign immunity; it is but one particular exemplification of that immunity.<sup>132</sup>

State immunity doctrine, as described in earlier portions of this article, has become complex with numerous exceptions, especially one permitting suits against officers but not against states themselves.<sup>133</sup> Some of the distinctions seem almost casuistic, allowing injunctive suits against state officers, but not state agencies.<sup>134</sup> What precisely are the values that underlie immunity and thus are to be placed in the balance in determining the appropriate scope of federal sovereignty vis-a-vis the states? The *Maritime* majority opinion, perhaps more than any other in the immunity series, unashamedly identified the difficult to quantify notion of state “dignity” as the principal value:

The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.

. . . .

The United States next suggests that sovereign immunity should not apply to FMC proceedings because they do not present the same threat to the financial integrity of States as do private judicial suits.

. . . .

This argument, however, reflects a fundamental misunderstanding of the purposes of sovereign immunity. While state sovereign immunity serves the important function of shielding state treasuries and thus preserving “the States’ ability to govern in accordance with the will of their citizens,” the doctrine’s central purpose is to “accord the States the respect owed them as” joint sovereigns.<sup>135</sup>

Early in his opinion, Justice Thomas apparently refused to join issue with Justice Breyer’s dissent about whether administrative adjudication, such as that in *Maritime*, is an exercise of the judicial power created and governed by Article III of the Constitution. He stated, “[f]or purposes of this case, we will assume, *arguendo*, that in adjudicating complaints filed . . . the FMC does not exercise the judicial power of the United States.”<sup>136</sup> Correctly, in my view,<sup>137</sup> his emphasis was not on this loaded and impossible to answer question, but on whether administrative adjudication is functionally the sort of thing that would be naturally encompassed by the constitutionally implicit state immunity

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132. *Id.* at 1870-71 (citations omitted).

133. *See supra* notes 24-70 and accompanying text.

134. *See supra* notes 63-67 and accompanying text.

135. *Maritime*, 122 S. Ct. at 1874, 1877 (citations omitted).

136. *Id.* at 1871.

137. *See infra* notes 191-92 and accompanying text.

doctrine that has been embraced by the majority.<sup>138</sup> Noting the majority's view that the doctrine was intended to apply to judicial-style proceedings, but that the framers were generally unfamiliar with administrative adjudication, Justice Thomas turned to analyze whether such adjudication sufficiently resembles court suits so as to warrant coverage under a doctrine intended for the latter.<sup>139</sup>

His opinion focused on court-like features of administrative adjudication in which the federal government supplies a forum for a dispute between two parties, other than the federal government itself.<sup>140</sup> Justice Thomas found that the FMC proceeding bears "a remarkably strong resemblance to civil litigation in [the] federal courts," reciting such issues as pleadings, motions, and discovery.<sup>141</sup> Most constitutionally damning was the statute's requirement that the Maritime Commission provide a neutral forum for resolution of a proceeding brought against a state by private parties to deal with legal and factual issues possessing merit on the face of their complaint.<sup>142</sup> In short, Justice Thomas, quoting the court below, concluded that the agency proceeding before the FMC "walks, talks, and squawks very much like a lawsuit."<sup>143</sup>

Given his distress, Justice Breyer's dissent could have made a more powerful attempt to resist these arguments than it did. Much of the opinion simply asserts that administrative adjudication is executive branch activity without offering reasons why immunity limits on judicial-style decision-making should not carry over to that context when the executive branch assumes such a role.<sup>144</sup> In only one passage does Justice Breyer seem to advert to such reasons and then only elliptically.<sup>145</sup> Below, I flesh out and explore what I take to be his argument—that administrative adjudication is different in ways that would justify either having no state immunity rules or at least different ones.<sup>146</sup> Those differences must either (1) result in a sufficiently lessened harm to state immunity values posed by adjudication when done by an agency, or (2) they must result in sufficiently increased benefits of governance or some sufficient combination of lessened harm and greater benefits. Below, I show that even fleshed out, what I take to be Justice Breyer's implicit arguments are not sufficient to make a case against state

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138. *Maritime*, 122 S. Ct. at 1872.

139. *Id.* at 1872-77.

140. *Id.*

141. *Id.* at 1873.

142. *Id.* at 1876-77.

143. *Maritime*, 122 S. Ct. at 1869 (internal quotations omitted).

144. *Id.* at 1881-83.

145. *Id.* at 1884-85.

146. *See infra* notes 163-202 and accompanying text.

immunity in this context, given the preceding line of decisions and their rationale.<sup>147</sup>

#### ANALYSIS

Immediately, the majority opinion in *Maritime* spawned vigorous criticism. In addition to the anguished dissenting opinions, impressive legal scholars read *Maritime* as a radical extension of an already radical line of cases. Here, again, is some of the reaction:

Nina Totenberg: Reaction to the [*Maritime*] decision across the ideological spectrum was less than enthusiastic, to put it mildly. Said one conservative scholar, "I'm beginning to be embarrassed."

...

Professor Charles Fried (Harvard): Here we have a chunk taken out of the power of the federal government, not a private party, to enforce federal law against the states, and that, I think, is a significant extension, and an unfortunate one.<sup>148</sup>

I remain critical of the Court's cases defining the scope and consequences of state immunity and am particularly critical of the states' rights majority's recent extensions, beginning with the *Seminole* opinion.<sup>149</sup> Like many others, I believe that the Court's extension of state immunity to suits arising under federal law is illegitimate.<sup>150</sup> However, I do not agree that *Maritime* itself is, in any clear respect, a radical extension of the recent ill-considered cases.<sup>151</sup>

Given the state immunity cases immediately preceding it, *Maritime* breaks little new ground on the surface of the opinion. State immunity to agency proceedings brought by private parties against states as named parties or seeking damages from state treasuries seems entailed by those earlier cases. In

147. *Id.*

148. NPR, *supra* note 2.

149. See Young, *supra* note 7, at 1429 n.120.

150. See *supra* note 38 and accompanying text.

151. In this respect, I find myself in, what is for me, the strange company of Bruce Fein:

Totenberg: Conservative Bruce Fein said the decision is largely symbolic.

Mr. Bruce Fein (Conservative): It seems to be, you know, a lot of bombast about very little.

NPR, *supra* note 2. My objection, like those of some other scholars interviewed, is to the entire recent line of immunity cases:

Totenberg: And Yale's Akhil Amar saw the decision as the latest example of what he said is a conservative willingness to disregard the words of the Constitution.

Mr. Akhil Amar (Yale): This is anything but strict construction of the Constitution, so this is yet another case in which the current Supreme Court is, in effect, striking down federal action without something clearly in the text or history of the Constitution to support that invalidation.

*Id.*

particular, the results in *Maritime* follow easily from combining the rationales of the immunity cases with a reasonable view of the relationship of agency adjudication to the values underlying Article III of the Constitution.<sup>152</sup> However, the portion of *Maritime* dealing with a claim for injunctive-style relief is filled with disturbing overtones, even though, on the surface, it also follows from pre-existing case law.<sup>153</sup>

#### *Claims for Monetary Compensation*

In the portion of *Maritime* that deals with a claim for monetary compensation from a state for its past wrongs, the majority opinion applies the immunity rules that would have been applicable to a comparable federal court proceeding.<sup>154</sup> On the surface of things, this is not surprising, and its correctness depends on whether the two sorts of proceedings—court adjudication and agency adjudication—are sufficiently similar, in terms of the policies underlying state immunity, to warrant applying the same immunity rules to both.

##### 1. The Weakest Case for Lifting State Immunity: Agency Proceedings that are Functionally Identical to Those in Federal Courts

Let us imagine the weakest case for an exemption from state immunity for agency adjudication and then see if the reality of most agency adjudication is significantly different. The weakest case would involve the use of agencies to supply fora for dispute resolution that are in all relevant ways functionally identical to courts. This would constitute nothing more than evasion of state immunity.

For these purposes, adjudication by an agency is functionally identical to a court proceeding against a state if the following are true: (1) The agency is empowered to adjudicate certain federal claims against states, and possibly against private parties as well, but not to engage in extensive lawmaking in the cases that it adjudicates. Therefore, it possesses no more authority than federal courts to make policy while adjudicating cases.<sup>155</sup> (2) Like a court, it possesses no discretion to dismiss claims meeting threshold requirements of legal and factual plausibility. By this, I mean that it is required to adjudicate any cases that would survive a motion to dismiss for failure to state a cause of action and a motion for summary judgment. (3) The agency can order either injunctive style relief or monetary compensation for harm done to individuals resulting from state violations of federal law. (4) The agency's orders are meaningful.

152. See *supra* notes 24-70 and accompanying text; see *infra* notes 71-119 and accompanying text.

153. See *infra* notes 186-209 and accompanying text.

154. See *supra* note 47 and accompanying text.

155. See Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 955 (1996).

Specifically, they must be enforceable either directly by United States marshals or, more traditionally, by the marshals after a confirming federal court order. On these assumptions, Congress has used an agency, exactly as it would a court, to do that which is prohibited by state immunity. Thus, there is a surface appearance that Congress has evaded state immunity without functional justification. Are these appearances deceiving or does agency adjudication constitute a constitutional evasion?

In this hypothetical set of cases in which functional differences are not available to justify less state immunity to federal agency proceedings than to federal court proceedings, the only difference that might suffice would somehow have to be rooted in such an agency's different position in the separation of powers. More specifically, it would have to be based on the agency's status as an executive branch entity<sup>156</sup> and not an Article III Court. In the absence of further justification, this seems a formalistic reason. It is also troubling in another way because the Constitution nowhere provides for agency adjudication of disputes within the federal judicial power.

Let us start with formalism and evasion and then deal with the judicial power issue. Given the nature of the extreme case that we are exploring first—that of an agency that provides no benefit to the federal government other than a forum in substitution for the federal courts—no unique benefits of

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156. In some cases, the agency, while executive in nature, may be classified as independent. This means that the agency head or heads can be removed only by the President for cause specified in a statute.

The heads of all agencies exercising general regulatory power or adjudicatory power are appointed by the President of the United States as required by the Appointments Clause, or in most other cases, by heads of departments who are themselves appointed by, and removable by, the Presidents. The Appointments Clause reads:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art II, § 2, cl. 2. The Appointments Clause has been held to provide the exclusive constitutional means for appointment of officers of the United States. *Buckley v. Valeo*, 424 U.S. 1, 139-40 (1976). The textual provisions for removal—the impeachment provisions—have been held nonexclusive. The Court has permitted Presidents to remove most officers of the United States for any reason or “at will.” However, in appropriate circumstances, Congress by law may restrict the President’s removal power to circumstances involving non-political good cause such as malfeasance or inability to perform adequately. In this case, the officer or agency created is said to be independent. Even so, the President must have “for cause” removal power over such officers sufficient to ensure that the laws are faithfully executed. *See generally Morrison v. Olson*, 487 U.S. 654, 691-92 (1988) (allowing the creation of agencies largely “independent” of the President but requiring an adequate minimum of presidential removal power).



governance plausibly could outweigh the policies underlying immunity. Certainly, eliminating state immunity cannot count as such an advantage, for that begs the question. We are looking for a valid reason not to apply immunity in this setting. Later, we will consider other cases in which agencies that adjudicate do perform more functions of government than do courts. In those cases, perhaps the added value of agency adjudications might justify immunity rules less stringent than those applied to courts, and perhaps not. But at least where agency adjudication offers government no more benefits than do court proceedings, the only argument in favor of agencies over courts is on the cost side of the equation, not on the benefit side. This cost-side argument is that agency proceedings inflict less of the harm that state immunity seeks to avoid. Specifically, agency proceedings pose less of a threat to the states' rights values underpinning immunity. Those values are protection of states' fiscal well-being and the preservation of state dignity.

How could locating an adjudicating body in the federal executive branch (and thus outside the judicial branch) reduce the threat to a defendant state's fiscal well-being and dignity in actions brought against it by private parties? The only argument to this effect that I can identify is that agencies are politically accountable in ways that federal courts are not, and that this difference is sufficient to overcome the constitutional policies that would support immunity in a court action. While accountability and political checks continue under current case law, just barely, to warrant subjecting states to substantive regulation under Congress' Article I powers,<sup>157</sup> recent immunity cases make clear that a national political decision is not sufficient to justify subjecting states to suits brought by private parties.<sup>158</sup> In short, states can be regulated under Congress' general regulatory powers, but these regulations generally cannot be enforced by privately initiated and controlled adjudication. This is precisely the point of *Seminole's* repeal of *Union Gas*, prohibiting Congress from eliminating state immunity except when it is legislating under Reconstruction Amendments and *only* when practically necessary to remedy constitutional violations of those amendments as interpreted by the federal

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157. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57 (1985). *Garcia* overruled *National League of Cities v. W.J. Usery*, 426 U.S. 833 (1976). *Id.* at 554-57 (concluding that, with rare exceptions, the Court should not invalidate federal legislation, otherwise within Congressional power, simply because states are the objects of regulation, and finding states' representation in the national political process usually a sufficient protection of their interests). In dissent, Justices Powell, Rehnquist and O'Connor seemed to vow to overrule *Garcia* in the future and restore *National League of Cities*. *Id.* at 580, 589.

158. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59-73 (1996) (overruling an earlier case that allowed Congress to abrogate state immunity when imposing duties on states in legislation supported by the Interstate Commerce Cause and apparently restricting such powers of abrogation to legislation under the Fourteenth Amendment).

courts.<sup>159</sup> When Congress exercises more common legislative powers, for example when Congress acts under the Interstate Commerce Clause, the laws it enacts cannot create private remedies that cut through state immunity.<sup>160</sup>

There are objections to these arguments but they seem weak. For example, one might say that a statute directly enforced by courts reflects political consensus at one time (the time of enactment), while one enforced by agencies has its meaning filtered through a branch more responsive to current politics, at least in cases in which the agency is not independent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* partly justifies judicial deference to agency interpretations on similar grounds.<sup>161</sup> But this seems weak as a justification for lifting state immunity. First, agency interpretations hold sway only within any clear limits imposed by statutes, so agency political accountability offers states no protection under statutes imposing liability on them under a scheme providing little or no agency discretion.<sup>162</sup> Second, to the extent that agencies do possess discretion to adjust the impact of a statute imposing liability on states, it is not altogether clear that the direction of adjustment will tend toward more protection of state interests over long-run constitutional time. If we are simply dealing with the substitution of agencies as fora for disputes against states, such a substitution fails to add any protection for states sufficient to warrant application of immunity rules different from those applied in federal court.

159. *Id.* at 59-73 (5-4 decision), *overruling* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989) (holding that, when legislating pursuant to the Commerce Clause, Congress has power to create a cause of action in favor of a private party against a state for monetary damages).

160. *See supra* notes 51-54 and accompanying text.

161. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (requiring judicial deference to many agency interpretations of enabling acts). *Chevron* made a similar, but perhaps crucially different, argument that presidential political accountability considers that:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Id.* This is not the only reason *Chevron* offered for its rule of deference. It could not stand alone because independent agencies interpretations are also entitled to deference under the *Chevron* doctrine.

162. *Id.* at 842-43 (finding that "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Most factors cut the other way, making clear that if states were to be exposed to what are essentially private damage claims, then Courts, not agencies, would be the constitutionally preferred forum. On this view, which is Justice Thomas', if courts cannot hear such claims, then by the greater logic, neither can agencies.<sup>163</sup> What supports such a position? First, there is symbolism. The federal courts are one of three co-equal branches of the federal government. It seems plausible enough to claim that, if states are to be subject to suits anywhere despite immunity, then the dignity interest stressed by the Supreme Court in the immunity cases<sup>164</sup> would require the most distinguished set of tribunals. Second, and related to the first, is a notion that, in federalism cases, the Article III Courts may be more than just another co-equal branch. Perhaps their existence reflects an attempt to come as close as possible to creating, within the federal government, a branch that can neutrally arbitrate disputes between the federal government and the states.<sup>165</sup> In a sense, the federal courts might be seen at the same time as inevitably within, but in some ways outside of, the federal government.

These two are connected with a third reason, the text of Article III of the Constitution and its underlying policies. The text of Article III appears to guarantee to litigants a right that certain claims litigated against them before federal tribunals will be heard in federal court.<sup>166</sup> There is no reason to believe that these guarantees apply in weaker form to states as litigants than they do to private parties. Federal administrative adjudication within the judicial power—for example, adjudication involving cases arising under federal law—needs to be justified in light of the Article III's grant of the federal judicial power to the politically insulated courts that it creates or authorizes.<sup>167</sup> All federal agencies that adjudicate, hear cases that are within the judicial power, because all arise under federal law. Any case such as *Maritime*, raising a state immunity issue, also involves a suit actually or arguably against a state, or the immunity issue would not arise. Suits in which a state is a party are within the federal judicial power as defined in Article III. Finally, *Maritime* itself also touches on admiralty, another part of the judicial power.<sup>168</sup> In ordinary

163. In *Maritime*, Justice Thomas stated that:

One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.

See *Fed. Mar. Comm'n v. S.C. State Port Auth.*, 122 S. Ct. 1864, 1874 n.11 (2002).

164. See *supra* note 135.

165. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* (1960) (stressing the court's unique suitability for resolving differences between states and the federal government concerning the proper contours of federalism).

166. See *supra* notes 71-77 and accompanying text.

167. See *supra* notes 69-72 and accompanying text.

168. See *supra* notes 117-121 and accompanying text.

language, the proceedings in *Maritime* were at least twice and possibly thrice within the judicial power.

I want to be as clear as possible about what I am not asserting. I am not suggesting that federal agency adjudication is unconstitutional on the ground that it usurps the judicial power of the United States. I largely agree with the Supreme Court cases permitting a great deal of non-Article III adjudication by federal agencies and Article I courts.<sup>169</sup> But all of the modern cases recognize that such adjudication is a departure from the original constitutional scheme that must be justified by reasonable necessity and hemmed in by appropriate safeguards.<sup>170</sup> In this respect, the course of these decisions resembles those approving congressional delegation of large amounts of legislative power to executive branch agencies. These rulemaking decisions allowed executive branch agencies, in essence, to make laws of the United States as long as they stayed within the very loose limits of enabling statutes.<sup>171</sup> In this way, the Court bent the original Constitution so that it would not break under the pressures of modern governmental realities.<sup>172</sup> The decisions dealing with transfer of judicial power to agencies,<sup>173</sup> like those permitting administrative

169. See *supra* notes 73-118 and accompanying text.

170. See *supra* notes 81-118 and accompanying text.

171. The most recent powerful indication is *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 474-75 (2001), where the Court stated: "In short, we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* *Mistretta v. United States*, 488 U.S. 361, 416 (1989).

172. See *Yakus v. United States*, 321 U.S. 414, 427 (1944) (allowing a federal Price Administrator the power to promulgate regulations specifying the prices of commodities subject, among other limits, to the proviso that such prices be "fair and equitable"). In this case, the Court stated that:

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.

*Id.* at 424-25 (citation omitted).

173. See *supra* notes 71-118 and accompanying text.

“rulemaking,”<sup>174</sup> recognize the departure from the original constitutional balance and, to some extent, a departure from the values underlying the original balance. The decisions attempt safeguards to preserve the original constitutional policies as well as they can be in the new age.<sup>175</sup> The reasonable assumption should be that any limit on adjudication of cases within the federal judicial power applies to adjudication by non-Article III tribunals unless there is sufficient justification for finding it inapplicable. Congress cannot transfer rulemaking power to agencies shorn of limits on congressional lawmaking (for example the First Amendment’s protections for speech) unless there is some justification. And, according to the states’ rights majority, state immunity was an implicit part of Article III from the beginning. For those Justices, it was an unstated limit on the scope of the federal judicial power. So, in the extreme case posed above in which an agency functions solely as would a court open to private disputes, not applying the same state immunity rules simply permits evasion while furthering no constitutional values.

2. The Strongest Case for Lifting State Immunity: Adjudication Before Agencies that Is Not Functionally Identical to that in Federal Courts.

If the usual case of agency adjudication were identical to adjudication in a federal court, then it is difficult to see why states should not be at least as immune to the former as to the latter. As discussed above, suspending immunity is doubly suspect based on the premises of the recent immunity cases. First, administrative adjudication is the very sort of process leading to precisely the sort of state liability that the framers wished to eliminate. Second, it is adjudication by executive branch officers, not politically insulated Article III’s judges, and in that respect, was not envisioned by the framers. If state interests were all that counted and the framers had intended to expose states to litigation, surely the forum of choice would have been an Article III court. However, federal agency adjudication is not identical to the same process in an Article III court. Thus, the question becomes whether the differences justify a suspension of the usual rules of immunity for litigation against states. If Justice Breyer has a valid objection to the letter of the *Maritime* majority opinion (leaving its disturbing overtones until later), it must be that functional differences between court and agency adjudication warrant suspension of the usual immunity rules for the latter.

174. See generally 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3:1-3:10 (2d ed. 1978) (discussing delegation doctrine and its abandonment). For examples of cases upholding delegations despite vague standards, see *Yakus*, 321 U.S. at 427; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 404 (1940); *United States v. Rock Royal Co-op Inc.*, 307 U.S. 533, 574 (1939).

175. See *supra* note 172 and accompanying text.

However, much of Justice Breyer's dissent seems an unconvincing and formalistic attempt to argue that simply because agencies are part of the executive rather than the judicial branch, they can do what courts do without the same immunity restrictions.<sup>176</sup> This dissent repeatedly cites *Crowell v. Benson* in support of this proposition.<sup>177</sup> But *Crowell* is not apposite. The *Crowell* majority saw the entire matter in the administrative adjudication that they review as occurring, in theory, in an Article III court. Recall that *Crowell* is a case permitting a strongly binding initial determination by an agency of a workers compensation claim.<sup>178</sup> In effect, the agency was the only federal trial court available to the parties in *Crowell*.<sup>179</sup> But *Crowell*'s theory was that the

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176. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1881 (2002) (Breyer, J., dissenting) Justice Breyer felt that:

The legal body conducting the proceeding, the Federal Maritime Commission, is an "independent" federal agency. Constitutionally speaking, an "independent" agency belongs neither to the Legislative Branch nor to the Judicial Branch of Government. Although Members of this Court have referred to agencies as a fourth branch" of Government . . . the agencies, even "independent" agencies, are more appropriately considered to be part of the Executive Branch . . . . The President appoints their chief administrators, typically a Chairman and Commissioners, subject to confirmation by the Senate . . . . The agencies derive their legal powers from congressionally enacted statutes. And the agencies enforce those statutes, *i.e.*, they "execute" them, in part by making rules or by adjudicating matters in dispute.

*Id.* (citations omitted). Justice Breyer stated further: "The Court's principle lacks any firm anchor in the Constitution's text. The Eleventh Amendment cannot help. It says: 'The *Judicial* power of the United States shall not . . . extend to any suit . . . commenced or prosecuted against one of the . . . States by Citizens of another State.'" *Id.* at 1883. In neither of these passages does Justice Breyer explain how resolution of a dispute between adverse parties and having the subject matter specified in Article III of the Constitution and thus within the judicial power is transmuted into something other than an exercise of that power simply because an act of Congress commits it to an administrative agency for resolution. See *infra* note 233 and accompanying text. The citation to *Crowell* is not apposite because *Crowell* viewed the agency whose activities it reviewed as an adjunct to an Article III court in resolving a dispute that was within the judicial power. See *infra* note 192 and accompanying text. The Court seems to have abandoned, as a fiction, *Crowell*'s view that an agency, adjudicating a dispute between two parties other than the United States is simply an adjunct to an Article III reviewing court. However, it has been abandoned for a more realistic separation of powers jurisprudence that allows the executive branch to exercise both some of the legislative power and some of the judicial power, subject to limits designed to balance concerns of constitutional stability and needed change. See *infra* note 192 and accompanying text. From this modern perspective, Justice Breyer's task is to explain why the judicial power transferred to the executive branch in *Maritime* should not transfer subject to the same state immunity limits that would apply in a federal court. He seems to make one sketchy argument to this effect. I attempt to elaborate this argument and discuss it in the text above, concluding that it is insufficient to warrant different rules for agencies and courts. See *infra* note 192 and accompanying text.

177. See *Maritime*, 122 S. Ct. at 1881-89 (Breyer, J., dissenting).

178. See *supra* notes 99-106 and accompanying text.

179. See *id.*

entire matter was adjudicated by the Article III courts, with the agency as a fact-finding adjunct to a real federal court (the reviewing court) operating within the federal judicial power.<sup>180</sup> Presumably, had the claim asserted in *Crowell* been against a state, then the agency proceeding would have been barred as one moored to a federal court case itself barred by state immunity.

At one point, however, Justice Breyer does seem to suggest a real functional difference between federal agencies and courts that is worthy, at least, to be considered as justification for the application of different state immunity rules:

The Court long ago laid to rest any constitutional doubts about whether the Constitution permitted Congress to delegate rulemaking and adjudicative powers to agencies . . . . Consequently, in exercising those powers, the agency is engaging in an Article II, Executive Branch activity. And the powers it is exercising are powers that the Executive Branch of Government must possess if it is to enforce modern law through administration.

. . . .

Twentieth-century legal history reinforces the appropriateness of this description. The growth of the administrative state has led this Court to determine that administrative agencies are not Article III courts . . . *that they have broad discretion to proceed either through agency adjudication or through rulemaking*, . . . and that they may bring administrative enforcement proceedings against States. At a minimum these historically established legal principles argue strongly against any effort to analogize the present proceedings to a lawsuit . . . brought by a private individual against a State in a federal court.<sup>181</sup>

I believe that Justice Breyer's point in the italicized excerpts above is that agency adjudication is often hybrid, combining dispute resolution with policy-making in ways that are very different from court adjudication and warrant suspension of the usual immunity rules. Perhaps the notion is that the public regulatory aspects of what are otherwise private disputes adjudicated by agencies make them, in effect, proceedings by the United States and thus not subject to immunity. Certainly, adjudicative aspects of such cases are private, resembling private lawsuits in a federal court. Indeed, *Crowell* says they are Article III private suits with the agency as a fact finding adjunct. So the dissenters' point must be that such disputes are hybrid, adding public regulatory aspects to what would otherwise be a more static, than dynamic, interpretation of statutes in the process of resolving individual disputes.

180. *Crowell v. Benson*, 285 U.S. 22, 56-58 (1932). See *supra* note 161 and accompanying text.

181. *Maritime*, 122 S. Ct. at 1881-82, 1885 (Breyer, J., dissenting) (citations omitted).

To give Justice Breyer his due, it is true that most agency adjudications do provide more than fora that are the functional equivalent of a federal court forum for dispute resolution. Most agencies, including the Federal Maritime Commission, possess considerably more power than courts to engage in lawmaking, however, one chooses to draw the line between that process and statutory interpretation.<sup>182</sup> Courts possess relatively limited lawmaking powers. By contrast, most agencies possess the power to make statute-like substantive rules within the considerable leeway allowed them by their enabling acts.<sup>183</sup> To sharpen the contrast with federal courts, agencies possess very wide, but not unlimited, discretion to choose to use their delegated lawmaking powers either in rulemaking proceedings or in adjudications.<sup>184</sup> By this, I mean that under *Chevron*, agencies are often enabled to make law broadly, in the course of adjudications. Administrative law cases antedating the federal Administrative Procedure Act and affirmed in recent years make it clear that agencies may exercise their delegated power to make (not simply interpret) law either through a legislative-style process, or through the decision of cases in adjudication.<sup>185</sup>

The *Chevron* doctrine, which dominates the current world of judicial review of federal administrative action, treats ambiguity in an agency's enabling act as a delegation to the agency to resolve it in any reasonable way.<sup>186</sup> This is true in formal adjudications as well as in both formal and

182. The Maritime Commission's decisions have been accorded deference under the *Chevron* doctrine. *Transpacific Westbound Rate Agreement v. Fed. Mar. Comm'n*, 951 F.2d 950 (9th Cir. 1991). This means that the Commission is recognized to have lawmaking authority within limits set by its enabling act. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). In *Mead*, the Court stated: "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229.

183. Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors In Administrative Law*, 41 WM. & MARY L. REV. 1463, 1477 (2000) ("[T]he courts generally have implied broad rulemaking authority from less than clear delegations to agencies.") (footnote omitted). *See also* *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 609-14 (1991); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 680 (D.C. Cir. 1973) (noting a "lack of hesitation in construing broad grants of rule-making power to permit promulgation of rules with the force of law"); *Pub. Serv. Comm'n v. Fed. Power Comm'n*, 327 F.2d 893, 897 (D.C. Cir. 1964) ("All authority of the Commission need not be found in explicit language . . . . While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail.") (citation omitted).

184. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (finding that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947))).

185. *See supra* note 184 and accompanying text.

186. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) ("If [the agency's interpretation of its enabling act] . . . represents a reasonable accommodation of



informal rulemaking.<sup>187</sup> Contrast this with federal courts which, with rare exceptions (for example, contempt cases), never institute the matters before them and that have seen their law-making authority greatly decrease in recent years.<sup>188</sup>

As a consequence, agency adjudication is often a vehicle for making law in ways that federal court proceedings are not. So, even if agency adjudication imposes the same costs on states as court litigation, the former might be seen as providing sufficiently more regulatory benefits to the federal government to warrant the application of different immunity rules.

Does this make such adjudications the equivalents of “suits by the United States” and, thus, not subject to state immunity even though initiated by a private party seeking monetary compensation from a state? If so, is it because the proceeding is “by the United States,” or because it is not a suit at all or both? There is, of course, no answer in the abstract. The real question is, given the constitutional values underlying state immunity, how should we define “suits” and “suits by the United States.” In short, we revert to considering whether such agency proceedings should be covered by immunity or not.

There are two ways to argue that, based on agencies’ power to make law in adjudications, the usual immunity rules should not apply to privately-initiated proceedings against states in agency fora. The first argument is based on a constitutional cost-benefit analysis that attributes sufficient extra value to agency proceedings to warrant relaxing immunity rules in order to encourage those proceedings. This sort of constitutional argument surely will not be accepted by all critics. My point immediately below is that, even if one

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conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” (citations omitted)). The Court has used implicit delegation as its rationale for deference to agency interpretations. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 134 (2000) (“Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” (citing *Chevron*, 467 U.S. at 843-44)).

187. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (stating that “the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

188. Lund, *supra* note 155, at 955 (finding that the Court appears to have made the presumption favoring incorporation of state law virtually irrebuttable). The article stated:

The Court indicated that federal courts may ‘displace’ the state law rule only when two conditions exist: when there is a ‘significant conflict’ between some federal policy or interest and the use of state law, and when the federal policy is one that is ‘genuinely identifiable’ from a federal statute.

*Id.*

accepts the validity of such an argument, the extra benefits of agency adjudication do not seem sufficient to warrant different rules.

The second argument, based on precedent rather than directly on constitutional policy, is that the existing case law that deals with non-Article III adjudication in “public rights suits” supports different immunity rules. This argument may overlap the first, because the precedent in question may be based on an acceptance of arguments resembling the first. Even treated as a separate argument, the second proves weak. Immediately below, I start with the first argument based on a constitutional cost-benefit analysis.

This first argument is that the opportunity to hear privately-initiated litigation against states provides opportunities for policymaking having benefits beyond the particular proceeding in which the policy is made. Here the focus is not some perceived extra fairness of administrative adjudication against states. No amount of fairness provides the protection of state immunity rules that specify that there should be no proceeding at all. The focus, instead, is on the federal government’s need to subject states to suits in order to regulate optimally in a variety of fields such as securities regulations, labor relations, and environmental protection. The argument must be that such administrative adjudication offers opportunities to hammer out policy that can later be useful to government well beyond the otherwise forbidden context of private suits against states. The policy, once made in cases seeking monetary compensation from states, would apply both to private interests and to states. On this view, the unique value of an agency proceeding is simply that it provides an opportunity to make policy with a broader, more legislative and discretionary quality than the small scale policy made by courts in the interstices of statutes.

Intuitively, this hardly seems sufficient, regardless of how many policymaking opportunities are at stake. Even if we take such opportunities as a great value, there are ample other occasions for the federal administrative state to develop policy to govern private interests and even to govern states. First, in most cases where states are regulated along with private actors, an agency can deploy its delegated lawmaking power to develop new law in a series of cases against the private actors.<sup>189</sup> Second, such policy can be made in agency proceedings against states initiated by the agency itself without violating existing immunity rules. Third, unless the Court chooses to greatly narrow *Ex Parte Young* or rule it inapplicable to agency proceedings, privately initiated suits to restrain state officers from violating agency enabling acts and regulations remain vehicles for policy making as well as specific dispute resolution.

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189. See *Bell Aerospace Co.*, 416 U.S. at 293; *supra* note 186 and accompanying parenthetical.

Finally, most agencies possess an alternative way to make policy—the power to formulate legislative rules that bind states, enforceable by suits and agency action brought by the United States, as well as by private suits seeking to enjoin state officers’ violations of federal regulations.<sup>190</sup> If one agrees with the Court’s current immunity jurisprudence, it is difficult to imagine that a relatively few more opportunities for an agency to make policy justify an exception to the very strong constitutional policy that states should not be subjected to private damage suits and to the strong, if symbolically-based, policy that they should not be the named party in a suit to restrain future violations of federal law.

The second argument is based on the line of cases, discussed above, allowing non-Article III adjudication of “public rights” issues in non-Article III courts that raise questions analogous to agency adjudication.<sup>191</sup> One might make the argument that some agency cases entertaining private damage claims are like public rights cases, involving not just the provision of a forum, as in *Crowell*, but also the use of the adjudication as a device for more active federal regulation by an expert federal agency. This might make adjudication by an agency more like a suit by the federal government (not subject to immunity if brought in a court) than like a private damage suit, which is subject to immunity. This already seems largely a recapitulation of the cost-benefit argument rejected above. Even if treated as somehow separate, based on precedent of which the cost-benefit underpinnings will not be reexamined, it still seems weak.

First, the public rights doctrine never has been clear and it is problematical in many ways.<sup>192</sup> But even accepting the doctrine on its own difficult terms, the best description of the cases dealing with the permissibility of non-Article III, federal court-like bodies, is that, as the cases adjudicated involve subjects perceived to need special protection, the Court has required more safeguards.<sup>193</sup> These protections, which help to justify non-Article III trials,

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190. See *supra* note 184 and accompanying text.

191. See Young, *supra* note 21, at 791-840, 847-69.

192. *Id.* at 863-65.

193. As to especially sensitive rights, constitutional rights, asserted in a criminal case, the *Northern Pipeline* Court required intensive safeguards:

In *United States v. Raddatz*, 477 U.S. 667 (1980), the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate’s proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. *Id.* at 676-77, 681-83. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. *Id.* at 685 (Blackmun, J., concurring). In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district

are supervision or appellate review by an Article III court.<sup>194</sup> As cases increase in sensitivity, the Court has required more protection.<sup>195</sup> At some point as sensitivity increases, the most intense protections are insufficient to deal with the problem, and no safeguards suffice. Consequently, a trial must be provided in an Article III court as opposed to some alternative.<sup>196</sup> Among the sensitive subjects requiring great safeguards are not just issues that might encroach on constitutional rights but also those that involve state-created rights.<sup>197</sup> The inclusion of state-created rights might seem somewhat strange, but it is the list we are given.<sup>198</sup> Where non-Article III adjudication of state-created rights is necessary to the operation of some legitimate federal statute—as in bankruptcy adjudication—it has been permitted, but only at the price of more Article III court review. Such non-Article III adjudication of state-created rights seems forbidden if not an integral part of some valid federal operation. Thus, it is fairly clear that pure diversity cases, tried federally, cannot be consigned either to an Article I court or to an agency.<sup>199</sup>

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court. *Id.* at 682. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. *Id.* at 683-684.

*N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 (1982). While perhaps not as sensitive as constitutional rights, state created rights also merited more protection under Article III than statutory rights created by Congress. *See supra* notes 175-177.

194. *See Raddatz*, 477 U.S. 667; *N. Pipeline Constr. Co.*, 458 U.S. 50.

195. *See N. Pipeline Constr. Co.*, 458 U.S. 50.

196. This is what happened in *Northern Pipeline* with respect to ordinary state-created contract and tort claims that would have been cognizable in federal court only under diversity of citizenship jurisdiction where assigned to a non-Article III tribunal for adjudication. *See N. Pipeline Constr. Co.*, 458 U.S. at 71-76 (holding that “Art[icle] III bars Congress from establishing legislative courts to exercise jurisdiction over [specified matters.]”). A majority found this unconstitutional. *Id.* at 76. The plurality made clear its view that such adjudication could not be supported whether the Bankruptcy Court was viewed as an Article I court or as an adjunct to an Article III court. *Id.* at 76-87.

197. *Id.* at 81. The *Northern Pipeline* Court held that:

[W]hile *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants’ argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights not created by Congress.

*Id.* at 81-82. The two examples of rights created by lawmakers other than Congress requiring more Article III safeguards are federal Constitutional rights and state created rights such as contract and tort law. *N. Pipeline Constr. Co.*, 458 U.S. at 80-87.

198. For a historical and legal discussion on the state immunity doctrine and agency adjudication, see *supra* notes 22-116 and accompanying text.

199. *N. Pipeline Constr. Co.*, 458 U.S. at 83-84 (“No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress’ power to define rights that it has

This begs the question whether a suit against a state as a named party or seeking damages from a state is as sensitive in terms of federalism as a private diversity case. Surely an affirmative answer follows from the Court's state immunity jurisprudence up to *Maritime*.<sup>200</sup> The Article III jurisprudence, in a highly prophylactic way, is aimed at giving litigants a fair forum and, in diversity cases, preserving a particular balance of federalism.<sup>201</sup> State immunity jurisprudence is aimed at insuring what the court sees as an appropriate balance of federal and state powers by, among other things, insuring that in most circumstances, states need not subject themselves in any forum to damage suits brought against them by private parties, even under valid federal statutes.<sup>202</sup> The underpinnings of state immunity are not concerned with providing states with fair fora in which to be sued by private interests. Instead, state immunity is aimed at assuring that there will be no forum, or suit, whatsoever.

#### *Claims for Injunctive-Style Relief*

While I believe that the portion of Justice Thomas' opinion that concerns claims for monetary compensation is just a straightforward application of a bad line of cases, other aspects of his opinion are troubling. Justice Thomas also finds the agency barred from hearing a claim for injunctive relief.<sup>203</sup> One

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created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.”).

200. The current majority's conclusion that retention of such immunity by states was a basic condition of entrance to the Federal Union seems to peg its constitutional importance at the high end of the spectrum. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996).

201. The point of vesting the judicial power in Article III judges—who hold tenure for life, during good behavior, and whose salaries cannot be diminished during their term in office—is to provide against certain forms of political pressure that would be difficult to establish on a case-by-case basis.

202. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1879 (2002) (opining that the Framers' aim was to guard “against encroachments by the Federal Government on fundamental aspects of state sovereignty [in order] to maintain the balance of power embodied in our Constitution and thus to ‘reduce the risk of tyranny and abuse from either front.’”) (citation omitted).

203. *Id.* at 1879. Justice Thomas stated:

Finally, the United States maintains that even if sovereign immunity were to bar the FMC from adjudicating a private party's complaint against a state-run port for purposes of issuing a reparation order, the FMC should not be precluded from considering a private party's request for other forms of relief, such as a cease-and-desist order. As we have previously noted, however, the primary function of sovereign immunity is not to protect State treasuries . . . but to afford the States the dignity and respect due sovereign entities. As a result, we explained in *Seminole Tribe* that “the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.” . . . We see no reason why a different principle should apply in the realm of administrative adjudications.

easily could write this off as not troubling, given the fact that the agency proceeding was brought against a statewide agency.

Suits against statewide agencies have been regarded as against the state for purposes of immunity.<sup>204</sup> Given this position, then, as to the injunctive-style relief sought and the claims for compensation previously discussed, *Maritime* applies to federal agencies the same rules of immunity that would apply in federal court. The doctrine of *Ex Parte Young* exempts from immunity suits against state officers seeking to enjoin violations of federal law, but, presumably on grounds of state dignity, it does not exempt suits seeking the same relief against the state (or a statewide agency) as a named party. Arguments in the previous section strongly support the conclusion that agencies and courts are not sufficiently different in ways relevant to the policies underlying immunity such that different rules should apply to them. Putting these premises together, *Maritime* is more of a logical extension than a radical extension of existing immunity law.

Despite this, I am concerned that nowhere in his opinion does Justice Thomas indicate that immunity would have fallen away had the suit been brought against the agency's head, in his official capacity, rather than against the state as a named party.<sup>205</sup> While one might conclude that this is just an instance of the Court's deciding no more than that which is presented, I am not satisfied that this is all that is going on. Justice Thomas' opinion is sweeping in its emphasis on the importance of the constitutional policy of according states "dignity."<sup>206</sup> Elsewhere he notes one alternative to privately initiated

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*Id.* (citations omitted). To review the other remedies the Appellant sought, see the quote accompanying footnote 127.

204. *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1978) (requiring dismissal, on grounds of state immunity, of proceedings brought against Alabama *and its Board of Corrections* by current and former inmates seeking a mandatory injunction to improve prison). *See also* HART & WECHSLER, *supra* note 32, at 1056 (citing *Edelman v. Jordan*, 415 U.S. 459 (1974) (reversing that portion of a lower court decision permitting, in a lawsuit against state officers, an award of retroactive monetary compensation to be paid from a state's treasury)).

205. There is a section of Justice Thomas' opinion that might be read to suggest that exactly the same rules of immunity that apply to federal courts apply to federal agencies. *See supra* note 203.

Other portions of Justice Thomas' opinion leave open the interpretation that, *at the least*, most state protective immunity applicable in courts should apply in federal agencies. On this view, court immunity rules may be just the minimum that apply to agency adjudications:

One, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.

*Maritime*, 122 S. Ct. at 1875 n.11.

206. For example, Justice Thomas stated:

The preeminent purpose of state sovereign immunity is to accord States the *dignity* that is consistent with their status as sovereign entities. "The founding generation thought it

federal agency proceedings against states—proceedings initiated by the federal government itself<sup>207</sup>—but nowhere does he mention privately-initiated agency proceedings against state officers as an alternative.

Recall the compromise between state immunity and state accountability to supreme federal law that was clarified by the Court early last century in *Ex Parte Young*.<sup>208</sup> States could not be named as defendants in suits brought by individuals, even those seeking only injunctive-style relief requiring future compliance with federal law.<sup>209</sup> But individuals could enforce valid federal rights they possessed against states by bringing *Ex Parte Young* suits, such as those suing a state officer,<sup>210</sup> in her official capacity, for a mandatory or negative injunction requiring future compliance.<sup>211</sup> This distinction seems to turn largely on dignity interests, because virtually the same protective outcome can be achieved regardless of whether the state is a party.<sup>212</sup> Plaintiff simply sues the appropriate officer and her successors rather than the state itself. In its other aspect, the doctrine prohibited suits by individuals seeking to recover damages against state treasuries for past wrongs, regardless of whether the state itself or an officer was named as a defendant.<sup>213</sup> This seems to be the substantive core of state immunity because substance, not form, is paramount. Finally, suits by the United States, at least if not simply evasions of the rules stated above, have not been subject to state immunity.<sup>214</sup>

If the portion of the proceeding in *Maritime* in which a private party sought an injunction had been authorized by statute to begin in federal court and not an agency, then, under existing case law, state immunity would not have applied, provided the agency proceeded against a state officer.<sup>215</sup> If the majority had a firm understanding that what was fatal in *Maritime* was that the

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‘neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.’”

*Id.* at 1874 (citations omitted). See *supra* notes 133-143 and accompanying text for a discussion of Thomas’ opinion.

207. See *Maritime*, 122 S. Ct. at 1878.

208. See *supra* notes 63-66 and accompanying text for a discussion of *Ex parte Young*, 209 U.S. 123 (1908), which permitted suits against state officers in order to stop unconstitutional state action by means of a fiction that the suit is not against a state.

209. See *Ex parte Young*, 209 U.S. at 150-51 (citing cases illustrating this point).

210. See *id.* at 63-66.

211. See *id.*

212. See *id.*

213. See *Edelman v. Jordan*, 415 U.S. 651, 657-59 (1974) (reversing that portion of a lower court decision permitting, in a lawsuit against state officers, an award of retroactive monetary compensation to be paid from a state’s treasury). See also *supra* notes 30, 46, 185 and accompanying text.

214. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

215. See *supra* notes 63-66, 204 and accompanying text.

proceedings were against a state agency rather than its head officers, it would have been easy to allay speculation. It would have been easy to avoid fruitless motions to dismiss on immunity grounds and needless appeals in future court cases. For this reason, I believe the odds are much more than negligible that these aspects of *Maritime* are a trial balloon for a future holding that *Ex parte Young*'s logic does not apply to administrative cases. Moreover, much less probably, but still possibly, they may be a harbinger of the erosion of *Ex parte Young* within its original federal-court domain.

If there might be a question about the wisdom of applying *Ex parte Young* to administrative proceedings, let us deal with it head on. Should *Ex parte Young* apply to administrative adjudications? In other words, had the state agency's chief officer been proceeded against in *Maritime*, instead of the state itself, should injunctive style relief nevertheless have been barred? Should either state immunity or the Tenth Amendment be seen as inconsistent with requirements that states go through a federal agency proceeding preliminary to a court proceeding for an injunction? One states' rights objection might be that the expense of one federal court trial proceeding and possible appeal is enough of a burden on states, and adding prior agency litigation expense crosses over the line of permissible burdens. Other objections, reverberating within the *Maritime* majority's emphasis on state dignity issues, might be that having the facts found by the agency to be nearly untouchable by the reviewing federal enforcement court<sup>216</sup> and having the law fixed by that agency, subject only to limited review under the *Chevron* doctrine,<sup>217</sup> denies the state the most august

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216. See *Ass'n of Data Processing Serv. Orgs., Inc., v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984). The court noted:

When the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a "nonarbitrary" factual judgment supported only by evidence that is not substantial in the APA sense—*i.e.*, not "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn . . . is one of fact for the jury."

*Id.* at 683-84 (citations omitted).

217. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (requiring reviewing courts to defer to any reasonable interpretation by an agency of its enabling act as long as it is not clearly precluded by the statute when interpreted using traditional tools of statutory interpretation). The Court held:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to



trial tribunals in one of the most sensitive type of cases, that of determining the freedom left to a state by federal law.

On the other hand, not allowing initial agency determination has drawbacks that would make difficult the regulation of states under legislative powers that were granted in the Constitution, such as the Commerce Clause. *Garcia v. San Antonio Metropolitan Transit Authority*<sup>218</sup> generally continues to permit such regulation despite vows from some of the current states' rights majority to return to the more restrictive rules of constitutional federalism that prevailed from 1976 to 1985.<sup>219</sup> Most regulation of states under federal law has also involved regulation of private parties acting similarly. Indeed, the Court's opinions might (or might not) be read as requiring such generality as a condition of valid federal regulation of states under the Commerce Clause.<sup>220</sup>

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the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43 (footnotes omitted). Later, the Court equates permissible constructions with reasonableness:

"If [the agency's interpretative] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

*Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)).

218. 469 U.S. 528, 556-57 (1985) (concluding that, with rare exceptions, the Court should not invalidate federal legislation, otherwise within Congressional power, simply because states are the objects of regulation, and finding states' representation in the national political process usually a sufficient protection of their interests).

219. In 1976, the Court held that, in addition to questions of the scope of affirmative grants of power under the Commerce Clause, regulations of states raised questions of special protections for their sovereignty. The Court then prohibited regulation of states' activities, even if sufficiently affecting interstate commerce as long as these were integral functions of government. *National League of Cities v. Usery*, 426 U.S. 833, 854-55 (1976). These were read so broadly that regulating ambulance services, operating a municipal airport, and operating a highway authority were regarded by lower federal courts as integral and protected. *Garcia*, 469 U.S. at 538. The line between integral and non-integral functions was very difficult to draw. *Id.* *Garcia* overruled *National League of Cities*. *Id.* at 557 (concluding that, with rare exceptions, the Court should not invalidate federal legislation, otherwise within Congressional power, simply because states are the objects of regulation, and finding states' representation in the national political process usually a sufficient protection of their interests). In their dissent, Justices Powell, Rehnquist and O'Connor seemed to vow to overrule *Garcia* in the future and to restore *National League*. See *id.* at 580, 588-89.

220. See *New York v. United States*, 505 U.S. 144, 187-88 (1992) (holding that either the Tenth Amendment or implicit Constitutional principles of federalism prohibits Congress from compelling states to enact laws with a content specified by federal law). Justice O'Connor's opinion for the Court declined to reconsider case law allowing Congress to regulate states pursuant to original legislative powers such as the Commerce Clause. *Id.* at 160. But she did, perhaps, suggest that such laws must, in order to be valid, regulate private conduct along with that of states. *Id.* at 160. This may be what she meant by the word "generally" in the following passage:

To apply *Chevron* to private defendant cases involving requirements of a particular statute administered by a federal agency, but not to cases under the same statute with state officer defendants, leads to multiple interpretations of regulatory statutes and chaos.<sup>221</sup> To apply appropriate deference to neither set makes the value of agency adjudication much more diminished. No longer would adjudication be a tool of policy making in areas where Congress cannot specify all of the important rules. *Chevron* is based on the premise that ambiguity in an agency's enabling statute should be treated as a congressional delegation to the agency to make law by resolving the ambiguity in any reasonable way.<sup>222</sup> To apply less deference to agency statutory interpretations in actions against states would be to apply a different anti-delegation doctrine for delegations of the power to regulate individuals than to delegations to regulate states. Much later, I will discuss my concerns that the Court may do this in other respects as well.<sup>223</sup>

Arguments for an extremely stingy or completely prohibitive doctrine concerning administrative regulation of states are intelligible, but they have the disadvantage of practically insulating states from significant portions of federal regulation still permitted by *Garcia*.<sup>224</sup> By this I mean that requiring courts to abandon *Chevron* deference for enforcement proceedings brought against states by private parties would (a) eliminate or at least greatly narrow agencies' delegated powers to regulate and (b) lead to more conflicts among federal circuits on the meaning of regulatory statutes.

One way of avoiding these problems is through direct enforcement of the statute by an agency proceeding initiated by the agency itself instead of by a private party. There are possible drawbacks to this as an alternative. First, it is possible that some agencies' enabling acts make direct agency enforcement impossible or at least more difficult than privately-initiated injunctive actions. However, this should be unusual. A more serious concern is that limiting the government to its own direct enforcement makes it more difficult for the government to use the private incentives to help ferret out violations and drive enforcement of regulatory policies. These are problems when the agency is

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Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws.

*Id.* (citing cases under the Fair Labor Standards Act and the Age Discrimination in Employment Act of 1967, both of which apply to private and state employers).

221. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987).

222. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

223. See *infra* section entitled "Broader Fears."

224. See *supra* notes 205-220 and accompanying text.

sympathetic to the privately-initiated proceedings. The problems may be greater when the agency lacks sympathy for claims that are nevertheless legally legitimate. In these cases, there would be near absolute immunity from statutory protections running against states. It is one thing for an agency to adjudicate a case with deferential judicial review. It is quite another for it to decline to bring an enforcement proceeding. In the latter case, there is often no judicial review at all on the ground that the decision to commence an enforcement proceeding is “committed to agency discretion.”<sup>225</sup>

States might object not only to federal court deference to agency legal interpretations in privately-initiated agency adjudications, but also to deference to agency fact-finding. An agency sued in court is entitled to fact-finding done by an Article III judge, a jury, or a master greatly controlled by an Article III judge. The issue is whether state dignity interests are unduly diminished by subjecting states to agency fact-finding, subject only to federal court review under either the substantial evidence or the arbitrary and capricious test.<sup>226</sup> This problem, if it is real, could be solved much more easily and without the chaos (discussed above) that would be engendered by two different degrees of deference to agency legal interpretation—one for cases in which the interpretation might affect state interests and another for other cases. Fact-finding, unlike statutory interpretation, radiates few effects beyond the case in which it occurs.

Thus, without creating serious systemic side effects, constitutional federalism could be seen as requiring *de novo* federal court review on the record for any finding of true fact that the state disputes.<sup>227</sup> This would have

225. *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (finding that “the principles of administrative law [generally call for courts to] defer to [the agency]”) (citation omitted).

226. The “scope of review” provisions of the APA read as follows:

[A federal court reviewing agency action shall:]

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by the statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706(2) (2000). Standard 2(A) governs, among other things, review of fact finding in informal agency proceedings and 2(E) governs such review in the context of formal proceedings. One of the best explanations of the federal APA’s two standards of review for agency fact finding can be found in an opinion written by Justice Scalia when he was a United States Court of Appeals judge. *See Ass’n of Data Processing Serv. Orgs., Inc., v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 682-84 (D.C. Cir. 1984).

227. During one era, other parts of the Constitution, particularly the Fifth and Fourteenth Amendments, were seen as requiring *de novo* fact finding for facts undergirding constitutional

little effect on application of the statute to private interests regulated under the same statute. Certainly, it would amount to discriminating in favor of states and against private regulated interests, but not nearly so much as allowing states to avoid such proceedings entirely.

As the passages above make clear, any attempt to stop agency adjudication resulting in an injunctive order against a state would go a long way toward making it difficult to regulate states in circumstances when the regulatory field is complex, technical, rapidly changing, and/or highly varied. In such cases, even a very well thought-out and carefully crafted statute is not likely to accomplish Congress' regulatory goals without the mediation of a policy-making agency. Together, the arguments above seem to rebut any argument that would differentiate agency injunctive proceeding from a similar federal court suit permitted under the doctrine of *Ex Parte Young*.

It is important to recall that in the section *supra* entitled "Claims for Monetary Compensation," dealing with agency proceedings seeking monetary compensation against states, the lack of differences between agencies and courts worked in favor of applying immunity to both sorts of proceedings.<sup>228</sup> Courts cannot entertain such suits, so why should functionally equivalent agencies? This section deals with injunctive-style relief against state officers. Here, similarities work the opposite way because such suits are not seen as offending state immunity and are thus allowed in courts. As previously surveyed, the differences between the court and agency actions of this sort are not different in sufficiently troubling ways so as to warrant a different result. Only if one rejects the legitimacy of federal agency adjudication of disputes within the federal judicial power—and I do not—should agency adjudication of private injunctive actions against states be seen as constitutionally problematic.

So far in this section, I have been discussing whether *Maritime* should have been decided differently, as to its injunctive aspects, if the appropriate state officers rather than the state itself had been sued. Beyond this, perhaps Justice Breyer is right as to *Maritime* on its facts, even though the state itself was sued. The *Maritime* dissenters argued that any injunctive-style order issued by the agency could be enforced only in a federal court suit brought by

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rights. See, e.g., *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287, 289 (1920). This requirement has all but been eliminated. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936). For a general discussion of these matters, see HART & WECHSLER, *supra* note 32, at 397. However, traces of such a requirement exist in matters of the utmost urgency such as claims of United States citizenship by those about to be deported. See *Agosto v. INS*, 436 U.S. 748, 753 (1978) ("[T]he Constitution requires that there be some provision for *de novo* judicial determination of claims to American citizenship in deportation proceedings.") (dicta used in interpreting an immigration statute). The current states' rights majority might see the claims of constitutional federalism as sufficiently compelling to require more factual review.

228. See *supra* notes 47, 154 and accompanying text.

the agency (the United States), and that such a suit is not covered by immunity. By itself, this hardly seems adequate. It would allow an agency to be used as a trial court, and judicial review would, in many instances, be a rubber stamp, given the great deference courts accord agency decisions. The irony would be that the rubber stamping courts could not have heard such a case themselves. Further, this view would permit privately-initiated agency damage proceedings against states, which is an almost impossible outcome given the immunity cases preceding *Maritime*. Perhaps the dissenters' arguments work better if applied to the limited world of privately-initiated agency actions seeking injunctive relief.

One could stress the role of the moving private parties before the agency as private attorneys-general, bringing violations to the attention of the government. Unlike damage suits, proceedings seeking injunctive-style relief have more of a public law flavor than suits seeking damages. A damage suit largely concerns sorting out the past and making particular parties whole. Certainly, an injunction often benefits private parties—sometimes just one party. But like legislation, injunctive relief is a forward-looking attempt to force compliance with supreme federal law. The benefits often radiate out to protect interests beyond those of the particular plaintiff, and, ultimately, those of the general public. With respect both to the injunctive proceeding before it and its decision to seek court enforcement, presumably the agency exercised at least the discretion of a court of equity and presumably more. This discretion has public interest as a main focus.

Beyond this, the difference seems razor-thin between (a) a proceeding seeking injunctive relief brought by the agency at the urging of a private party and thus not barred by state immunity, and (b) one brought directly by a private party before the agency, but subject to the agency's considerable equitable discretion. Indeed the difference seems symbolic. For this reason, one could argue that not only should the *Ex Parte Young* doctrine permit agency injunctive-like orders against state officers, but also that such proceedings—viewed from agency start to court finish—are more plausibly assimilated to suits brought by the United States, and for this reason, not subject to state immunity.

However, there is no reason to believe that the Court will soon recant the injunctive aspects of its *Maritime* opinion. Certainly, the distinction between suits against states and suits against state officers seeking essentially the same relief is largely symbolic and based on state dignitary interests. But the symbolism of state dignity has long been honored by the line drawn in *Ex Parte Young*, and state dignitary interests seem even more important to the current majority than to those of years past.

*Broader Fears*

The concerns discussed above could be seen, in a way, as a ghost story. If so, it is one told in a context in which the ghosts just might be real. Justice Thomas did not repudiate the application of *Ex Parte Young* to administrative proceedings, but his opinion leaves concern that the Court may do this. I believe that this and other possible extensions of state immunity are responsible for the hostile reaction to *Maritime*. What other extensions lurk? If the Court applies different immunity rules to agency proceedings than to court proceedings, will other rules be also applied differently, in the name of states' rights? Will the anti-delegation doctrine apply differently so as to require tighter legislative controls when the delegation creates agency discretion to issue rules and regulations governing states? Will the exception to immunity for proceedings brought by the United States be reconsidered as especially threatening when shaped by an agency whose orders and rules are the objects of great deference by Article III courts?

Furthermore, if the Court refuses to apply *Ex Parte Young* to administrative proceedings, will that just be a step toward narrowing the doctrine generally, as applied to court proceedings as well? Will *Ex Parte Young* come under reconsideration by more members of the states' rights majority than the two Justices who urged limiting such court suits in *Coeur d'Alene*?<sup>229</sup> The opinions in that case do not suggest that this will happen. However, resignations and new Supreme Court appointments may put pressure on *Young* and the predominant method of holding states accountable in courts.

## CONCLUSION

In a sense, *Maritime* formally breaks no new ground. Ultimately, administrative adjudications against states as named parties or against state officers seeking damages from the state's treasury are not sufficiently distinguishable from analogous proceedings in courts to justify exemption from the doctrine of state immunity as embraced by a majority of the current Supreme Court. The language of Article III of the Constitution vests the judicial powers of the United States in the regular federal courts, and state

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229. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287-88 (1997) (holding that certain suits against state officers to quiet title to land and that implicate major state interests are outside of the exception to state immunity recognized for suits seeking prospective relief against state officers and, thus, barred). Justice Kennedy's opinion (otherwise for the majority), which was joined only by Chief Justice Rehnquist, took the position that the availability of an injunction against a state officer, under the *Ex parte Young* doctrine should depend upon a balancing test including, as one factor, the availability of relief in state courts. *Id.* at 270-88. Justices O'Connor, Scalia, and Thomas disagreed on this point, concluding that the suit in *Coeur d'Alene* was barred by a narrow exception to *Ex parte Young* suits, which they saw as presumptively within the federal courts jurisdiction, and not generally barred by principles of federalism including immunity. See *id.* at 291-97 (O'Connor, J., concurring).

immunity was designed to limit such power. Consequently, the burden of persuasion is on those who would justify exemption for any sort of judicial-style proceeding. Such a proponent must show: (1) that agency adjudication is significantly less threatening to the constitutional policies underlying state immunity than is a court suit, (2) that such adjudication has special advantages of governance that justify exemption, or (3) some satisfactory combination of the first two.

In this respect, Justice Breyer's opinion, arguing that *Maritime* is a troubling extension of bad doctrine, seems an exaggeration. In *Maritime*, damages were sought against a state treasury and, as to the portion of the case seeking an injunctive remedy, the state was named a party. Each would have been barred if brought in a court.

In one way, I do agree with Justice Breyer. As to the injunctive remedy, it would be preferable to see the proceeding as a public action brought by the federal government for public purposes going beyond the interests of the parties who sought the remedy. In other words, it is justifiable to see the *Maritime* proceedings, in this respect, as an action by the federal government and, consequently, as exempt from state immunity as it would be had it been brought in a federal court by the United States as plaintiff. But even this issue seems less than momentous. It would be entirely consistent with the *letter* of the majority's opinion for agencies to adjudicate privately-initiated proceedings seeking injunctive style relief so long as state officers, and not the state, are the named defendants. The difference is only symbolic—the same protection against states is available in another form.

Recall that Justice Breyer read his dissent from the bench, expressing unhappiness in ways that go beyond his general objection to the recent state immunity cases that preceded *Maritime*:

Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose. In saying this, I do not simply reiterate the dissenting views set forth in many of the Court's recent sovereign immunity decisions. *For even were I to believe that those decisions properly stated the law—which I do not—I still could not accept the Court's conclusion here.*<sup>230</sup>

Given what a small extension of the previous line of state immunity cases that *Maritime* represents, what is so troubling to Justice Breyer and his partners in dissent? Some of the disquiet is, of course, an objection to the already extant decisions. I think most of it lies in an already existing apprehension about where the state decisions will lead in the future and in aspects of the *Maritime* opinion that might be seen as threatening really drastic changes.

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230. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1881 (2002) (Breyer, J., dissenting) (emphasis added) (citations omitted).

These may include narrowing the current law governing injunctive-style proceedings against state officers. It may also include a restriction of the freedom of the federal government to use agencies as regulatory instruments when states are the regulated parties. Such a combination of federalism with separation of powers—specifically, special rules for federal regulation of states could threaten agency rulemaking as well as agency adjudication when states are targets.

We wait to see how pressures for and against centralization of government in the United States, new elections, and possibly new justices, will continue the not-so-smooth curve of American constitutional federalism. In the meantime, *Maritime* has exacerbated an already bad case of nerves among those who fear that the Court has only begun to unduly limit the effective scope of federal regulatory power as it vies with claims made on behalf of state autonomy.



